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NO.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

MARTHA JO POINTER,

Petitioner

vs.

CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT AND THE CITY OF FARMERS BRANCH

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STEINBACH & STEINBACH,
A Professional Corporation
R. Scott Steinbach,
Counsel of Record
Texas Bar No. 19131400
Charles E. Klein
Texas Bar No. 11556500
Wellington Centre, Suite 325
14693 Dallas Parkway
Dallas, Texas 75240
Telecopier: (214) 960-8815
Telephone: (214) 960-1850

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MARTHA JO POINTER

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QUESTIONS PRESENTED

1. Is Bankruptcy Court permission required before a creditor, such as Pointer, has standing to assert that a post-petition claim for ad valorem tax liens of another creditor violates the automatic stay of 11 U.S.C. § 362 and are therefore invalid.

2. Does a Chapter 11 "Debtor-In-Possession", such as Pointer, have standing to seek a determination as to the validity, extent and priority of ad valorem tax lien claims against real property of the estate requesting a declaration that the claims did not attach to real property owned by the Debtor because of violation of the automatic stay imposed by 11 U.S.C. § 362 in her bankruptcy proceeding and in a previous bankruptcy proceeding.

3. Does the automatic stay imposed by 11 U.S.C. § 362 prevent post-petition "automatic perfection" of ad valorem tax liens against real property of the bankrupt estate?

LIST OF PARTIES

MARTHA JO POINTER:

Appellee below and Petitioner herein.

CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT:

Appellant below and Respondent herein.

CITY OF FARMERS BRANCH:

Appellant below and Respondent herein.

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OPINIONS BELOW

The opinion delivered by the United States Court of Appeals for the Fifth Circuit is reported at City of Farmers Branch v. Pointer, No. 90-7072, slip op. at 2259 (5th Cir. Jan. 14, 1992). The Opinion delivered by the United States District Court, Dallas Division, is not reported. The Opinion of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, is reported at In re Pointer, 113 B.R. 285 (Bankr. N.D. Tex. 1990).

Each of the above referenced opinions are included in the Appendix to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 14, 1992. A timely filed petition for rehearing was denied on February 11, 1992. Title 28 U.S.C. § 1254(1) confers jurisdiction on the Supreme Court to review the judgment in question.

STATUTES

The following statutes are involved in the case.

11 U.S.C. §362(a)(4):

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3), operates as a stay, applicable to all entities, of

> (4) any act to create, perfect, or enforce any lien against property of the estate.

11 U.S.C. § 362(d):

On request of a party in interest and after notice and a hearing, the Court shall grant relief from the stay provided under subsection (a) of this section, such as terminating, annulling, modifying, or conditioning such stay...

STATUTES

(Continued)

11 U.S.C. § 505(a)(1):

Except as provided in paragraph (2) of this subsection, the Court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

11 U.S.C. § 545(2):

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien:

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists.

STATUTES

(Continued)

11 U.S.C. § 549(a)(2)(B):

Except as provided in subsections (b) or (c) of this section, the trustee may avoid a transfer of property of the estate - that is not authorized under this title or by the Court.

28 U.S.C. § 2201(a):

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such

declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Texas Prop. Tax Code § 32.01 (Vernon 1982):

On January 1, of each year, a tax lien attaches to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on that property, whether or not the taxes are imposed in the year the lien attaches. The lien exists in favor of each taxing unit having power to tax the property.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MARTHA JO POINTER, Petitioner herein, respectfully prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Fifth

Circuit entered on January 14, 1992, as holds: (1) that Petitioner does not have standing to assert that Respondents do not have valid tax liens against property of her bankruptcy estate because their alleged creation or perfection violated the automatic stay of 11 U.S.C. § 362 in her bankruptcy and in a prior bankruptcy proceeding; and (2) that the purported "automatic perfection" of liens for ad valorem taxes under state law constituted a "transfer of property" under the Bankruptcy Code, to which only the trustee or debtor-in-possession has standing to complain. Conflicting decisions of various Circuit Courts of Appeals require the Supreme Court to hear and decide this case to establish a single rule to be applied in all Circuits.

For clarity sake, Petitioner will be referred to as "Pointer" and Respondents will be referred to as "Taxing Units".

STATEMENT OF THE CASE

(i) COURSE OF PROCEEDING AND DISPOSITION BY THE FIFTH CIRCUIT APPELLATE PANEL:

On January 10, 1990, pursuant to the jurisdiction conferred by 28 U.S.C. § 157(2)(k) and § 1334(b), Pointer filed in the Bankruptcy Court in which her Chapter 11 petition was pending a Complaint to Determine Extent, Validity and Priority of Liens (the "Complaint") against the City of Farmers Branch and the Carrollton-Farmers Branch Independent School District (collectively the "Taxing Units"). Pointer sought, among other things, a declaration that the Taxing Units do not hold valid liens against property of her estate to secure postpetition taxes.

The Taxing Units answered the Complaint on February 5, 1990, and the matter was argued upon a joint stipulation of facts before the United States Bankruptcy Court, Dallas Division, the Honorable Robert C. McGuire presiding, on March

20, 1990. Pointer's standing was never challenged.

On April 13, 1990, the Bankruptcy Court signed a Memorandum Opinion which included findings of fact and conclusions of law. On June 5, 1990, the Bankruptcy Court's corrected judgment was entered, declaring, in pertinent part:

(1) that the Taxing Units do not hold valid liens against the Valwood Village Apartments ("the Property") to secure post-petition ad valorem taxes for the years 1987 and 1988. [This ruling was reversed by the Court of Appeals and is now the subject of this Petition];

(2) that the Taxing Units hold valid tax liens against the Property to secure pre-petition ad valorem taxes for the years 1985 and 1986; [This ruling was not challenged]; and

(3) that the Taxing Units' liens for the years 1985 and 1986 do not secure penal-

ties, fees or other costs associated with or attributable to such taxes. [This ruling was affirmed.]

On May 3, 1990, the Taxing Units filed their Notice of Appeal to the United States District Court for the Northern District of Texas. Pointer's standing was not challenged. The District Court affirmed the decision of the Bankruptcy Court in all respects by Memorandum Opinion entered on November 15, 1990. The Taxing Units filed their Notice of Appeal to the Fifth Circuit on December 10, 1990, invoking the jurisdiction of that Court pursuant to 28 U.S.C. § 1291. Pointer's standing was not challenged.

(ii) SUA SPONTE DENIAL OF STANDING BY THE FIFTH CIRCUIT APPELLATE PANEL:

On January 14, 1992, the Fifth Circuit Appellate Panel ("Panel") composed of the Honorable Circuit Judges King, Johnson and Emillio Garza affirmed the district court's deci-

sion that the Taxing Units are not entitled to post-petition penalties, fees and costs as part of their secured claim for the unpaid 1985 and 1986 taxes. The Court apparently found that Pointer had standing to challenge the penalties, fees and costs. The Panel refused to find, however, that Pointer had standing under the Bankruptcy Code to "avoid" the Taxing Units' 1987 and 1988 ad valorem tax liens. Such finding was a result of a *sua sponte* review of standing which deprived Pointer of a fair opportunity to brief and argue such issue in the Court of Appeals.

(iii) REHEARING IN THE FIFTH CIRCUIT:

Pointer timely filed a petition for rehearing alleging among other things that she had standing to request a determination as to the extent, priority and validity of the Taxing Units' lien claims for 1987 and 1988 taxes pursuant to 11 U.S.C. § 505. Pointer also argued that the Court of Appeals did not review her

standing in her own bankruptcy. The request for rehearing was denied without oral argument and without formal opinion on February 11, 1992.

(iv) STATEMENT OF FACTS:

The facts relevant to the issues presented for review have been stipulated by the parties. (R-00417) From 1963 through 1969, Gerald Pointer built an apartment complex in Farmers Branch, Texas, known as Valwood Village Apartments. In or about 1977, Gerald Pointer sold the Valwood Village Apartments and as partial consideration, accepted a promissory note secured by a deed of trust granting Gerald Pointer a lien on the Valwood Apartments.

In 1982, Gerald Pointer and his wife, Martha Jo Pointer (Petitioner), were divorced. As part of the Pointers' divorce decree, Martha Jo Pointer was awarded the promissory note and deed of trust lien upon the Valwood Village Apartments. During the early 1980's, the Valwood

Village Apartments were transferred to various entities. All transfers of the Valwood Village Apartments were subject to the Pointers' lien. Martha Pointer had no ownership interest in any of the entities to which the Valwood Village Apartments were transferred.

In 1986, the Valwood Village Apartments were owned by an entity named Valwood Village Apartments, Ltd. ("VVAL"). On April 25, 1986, an involuntary petition under Chapter 7 of Title 11 was filed against VVAL. The VVAL case is currently pending as a Chapter 7 in the Northern District of Texas, Case No. 386-31339-HCA-7. Included in the VVAL estate was the real and personal property of the Valwood Village Apartments.

On November 16, 1987, Pointer filed a petition for relief under Chapter 11 of the United States Bankruptcy Code. On February 2, 1988, Pointer, acting as debtor-in-possession, filed a motion for relief from the stay in the VVAL bankruptcy case seeking an order modify the stay to

allow Pointer to foreclose her lien upon the Valwood Apartments. On June 9, 1988, the Bankruptcy Court presiding over the VVAL bankruptcy case ordered that the automatic stay be lifted for the limited purpose of allowing Pointer to enforce her security interest in the Valwood Apartments. On September 6, 1988, Pointer conducted a foreclosure sale of the Valwood Apartments and purchased the Valwood Apartments. The property immediately became protected by her bankruptcy stay.

On January 10, 1990, Pointer filed in her own bankruptcy case a complaint in which she asked the bankruptcy court to declare, among other things, that the Taxing Units "have no liens upon the Valwood Village Apartments for 1987 and 1988 ad valorem taxes." Pointer conceded that the Taxing Authority had liens upon the Valwood Apartments to secure the payment of pre-petition 1985 and 1986 base taxes and interest only, without penalties and fees. The

Taxing Units filed answers to said Complaint, neither of which contested Pointer's standing. On June 6, 1990, after hearing arguments upon stipulated facts, the Bankruptcy Court entered its Corrected Judgment which declared:

(1) that the Taxing Units do not hold valid liens against the Valwood Village Apartments to secure ad valorem taxes for the post-petition years 1987 and 1988; [This ruling was reversed and is the subject of this petition];

(2) that the Taxing Units hold valid tax liens against the Property to secure pre-petition ad valorem taxes for the years 1985 and 1986; [This ruling was not challenged]; and

(3) that the Taxing Units' liens for the years 1985 and 1986 do not secure penalties or other costs associated with or attributable to such taxes. [This ruling was affirmed.]

This District Court affirmed the judgment of the Bankruptcy Court and appeal to the Fifth Circuit Court of Appeals followed. Accordingly, the issues briefed and presented for the Fifth Circuit's review were:

ISSUE NO. 1 BRIEFED TO FIFTH CIRCUIT

The United States Bankruptcy Court for the Northern District of Texas, Dallas Division, determined that the automatic stay of §362 barred the Taxing Units from obtaining tax lien status for post-petition 1987 and 1988 taxes and that the exceptions to the automatic stay set forth in 11 U.S.C. §§ 362(b)(3) and 546(b) do not apply. The District Court affirmed the decision. Was this error?

ISSUE NO. 2 BRIEFED TO FIFTH CIRCUIT

The United States Bankruptcy Court for the Northern District of Texas, Dallas Division, determined that the Taxing Units were not entitled to penalties, fees, costs, or other charges on portions of all unpaid ad valorem taxes that the Court determined were secured by valid liens for taxes on the Property (i.e., taxes for 1985 and 1986) because the Taxing Units' claim for such charges did not arise under an agreement as required under 11 U.S.C. §506(b). The District Court affirmed this decision. Was this error?

By Opinion dated January 14, 1992, the Fifth Circuit Court of Appeals affirmed the District Court's decision on Issue No. 2 and, after a *sua sponte* review of Pointer's standing, found that Pointer lacked standing to assert her claim, reversed the District Court's decision on Issue No. 1, and subsequently denied her petition for rehearing.

REASONS FOR GRANTING THE WRIT

Pointer's Application for Writ of Certiorari should be granted to resolve serious conflicts between various Courts of Appeals and because the Court of Appeals departed from the accepted and usual course of judicial proceedings necessitating this Court's supervision.

Specifically, the opinion of the Fifth Circuit Court of Appeals conflicts with opinions of this Court and other Courts of Appeals on the following issues:

(1) Whether a violation of the automatic stay imposed by 11 U.S.C. § 362 is void or voidable. See Kalb v. Feuerstein, 308 U.S. 433 (1940); Smith v. First America Bank, N.A., 876 F.2d 524 (1st Cir. 1989); Morgan Guaranty Trust Co. of New York v. American Savings & Loan Ass'n., 804 F.2d 1487 (9th Cir. 1986), cert denied, 482 U.S. 929 (1989).

(2) Whether a creditor must first seek permission from the Court to have standing to assert a violation of the automatic stay by another creditor. See In re McKeesport Steel Castings Co., 700 F.2d 91 (3rd Cir. 1986); In re STN Enterprises, 779 F.2d 901 (2d Cir. 1985); In re Louisiana World Exposition, Inc., 832 F.2d 1391 (5th Cir. 1987).

(3) Whether the post-petition automatic creation of tax liens under state law against property of the estate is a violation of 11 U.S.C. § 362. See Equibank, N.A. v. Wheeling Pacific Steel Corp., 884 F.2d 80 (3rd Cir. 1989); Maryland National Bank v. Mayor and City Council of Baltimore, 723 F.2d 1138 (4th Cir. 1983).

The Court of Appeals departed from the

accepted and usual course of judicial proceedings by:

(1) ignoring Pointer's standing as a debtor under 11 U.S.C. §§ 545 and 549 in her own bankruptcy case to assert a violation of the stay.

(2) dismissing the portion of her complaint which alleges the Taxing units do not hold valid liens against the property for 1987 and 1988 taxes rather than remanding the case to allow Pointer to comply with the Court's new procedural requirement of seeking permission from the VVAL court to assert her claim; and

(3) failing to find Pointer's standing as a debtor-in-possession to seek a declaration under 11 U.S.C. § 505 that the taxes are illegal due to the Taxing Units' violation of the stay.

ARGUMENT

QUESTION NO. 1 RESTATED

Is bankruptcy court permission required before a creditor, such as Pointer, has standing to assert that the post-petition creation of ad valorem tax liens by another creditor violates the automatic stay of 11 U.S.C. § 362 and are therefore invalid.

1.A. CREDITORS HAVE STANDING TO ASSERT A VIOLATION OF § 362 BY OTHER CREDITORS.

The Court of Appeals found that Pointer had sufficiently alleged a personal stake in the outcome of the controversy to support constitutional standing as well as non-constitutional prudential considerations. Warth v. Seldin, 422 U.S. 490, 498 (1975). The Court declined, however, to find that Pointer had statutory standing under the Bankruptcy Code to seek relief for an alleged stay violation by another creditor, limiting its review to §§ 362 and 549(a) of the Bankruptcy

Code.

The Court of Appeals ignored the well established principle that creditors, as well as debtors, have standing to assert a violation of the automatic stay imposed by 11 U.S.C. § 362. See In re Chernicky Coal Company, Inc., 67 B.R. 828 (Bankr. W.D. Mo. 1987). The legislative history of § 362 shows that creditors are clearly intended to benefit from the automatic stay. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977). An analysis of the entire statute and the rules of procedure applicable to it demonstrate a creditor's standing.

Section 362(d) sets forth the requirements for a "party-in-interest" to seek relief from the stay by terminating, annulling, modifying or conditioning the stay. Pointer, as a creditor of VVAL, would have received a copy and an opportunity to object had the Taxing Units complied with § 362(d) and filed in the VVAL case a motion for relief from stay to allow their liens

to attach. Any agreement to such motion also would have been served on the creditors, including Pointer. The creditors would have then had an opportunity to object under Bankruptcy Rule 4001(d). Therefore, since Bankruptcy Rule 4001(d) gives Pointer standing to object to any motion by the Taxing Units to modify the stay to allow their tax liens to attach post-petition, Pointer likewise has standing to assert a violation of the stay. The requirements of § 362(d) and Bankruptcy Rule 4001(d) would be meaningless if creditors lacked standing to complain of a violation of the stay. The Court of Appeals erroneously overlooked this basis for standing.

1.B. COURT OF APPEALS SHOULD HAVE REMANDED.

The Court of Appeals summarily dismissed any notion that Pointer had standing under 11 U.S.C. § 362(h) stating that she did not seek "actual damages" in her Complaint. She did, however, pray for general relief. Since Pointer's com-

plaint must be construed in her favor, her prayer for general relief is sufficient to support actual damages. Warth v. Seldin, 422 U.S. 490, 510 (1974). If not, the proper action for the Fifth Circuit would have been to remand the case and allow Pointer to amend her pleadings to support standing before *sua sponte* dismissing her complaint. Id. at 501.

1.C. THE COURT OF APPEALS ERRONEOUSLY APPLIED 11 U.S.C. § 549(a).

The Fifth Circuit incorrectly reviewed Pointer's standing under § 549(a) of the Code, which is limited to post-petition transfers of property. The pertinent portion of § 549(a) states: "Except as provided in subsections (b) and (c) of this section, the trustee may avoid a transfer of property of the estate made after the commencement of the case..." 11 U.S.C. §549(a)(1). The Court of Appeals concluded that an "automatic" attachment of the tax liens occurred notwithstanding the automatic stay, and only the VVAL

trustee had standing to complain. The Court's conclusion that the liens attached is contrary to the decisions of this Court and other Circuit Courts of Appeals. See Kalb. v. Feuerstein, 308 U.S. 433 (1940); Smith v. First America Bank, N.A., 876 F.2d 524 (1st Cir. 1989); Morgan Guaranty Trust Co. of New York v. American Savings & Loan Ass'n., 804 F.2d 1487 (9th Cir. 1986), cert denied, 482 U.S. 929 (1989).

Under Texas law, on January 1 of each year, a tax lien allegedly attaches to real property to secure the payment of taxes ultimately imposed for said year. If the Taxing Units' automatic creation of liens on the property were transfers on January 1, 1987 and January 1, 1988, by whom were the transfers made, and to whom were they made? Clearly, the Debtor did not "transfer" the property. Only the Taxing Units had the power to impose the liens. The Fifth Circuit's analysis that the Taxing Units' alleged "automatic" assertion of liens caused a transfer of the Debtor's

interest in its property is a non sequitur and presumes that the liens attached notwithstanding the automatic stay.

If the Court is to assume that the liens attached notwithstanding the automatic stay, the Court should then apply § 545 of the Code, entitled "Statutory Liens," which states:

> "The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent such lien - is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser..." 11 U.S.C. § 545(2).

This provision concerns liens arising solely by force of a statute on specified circumstances or conditions. See 11 U.S.C. § 101(53). Since the Taxing Units' purported liens allegedly arise by operation of law on January 1 of each year in which the taxes are due, they are statutory liens and if they did attach notwithstanding the automatic stay, the Fifth Circuit should have reviewed Pointer's statutory standing under § 545

rather than § 549. Had the Court applied the correct statute, standing would have been found.

Assuming arguendo, that the Court of Appeals' review of Pointer's standing under § 549 was correct, its application of the facts to the law was incorrect. The lower court reasoned that since Pointer was neither a trustee nor debtor-in-possession, she lacked standing to bring an action insofar as she sought to avoid the 1987 and 1988 ad valorem tax liens. What the Court failed to realize was that Pointer had previously filed bankruptcy on November 16, 1987, and at the very least had standing in her own case under §§ 545 or 549 as a debtor-in-possession to assert the invalidity of tax liens for 1988 taxes that were created "post-petition" on January 1, 1988, by operation of law.

1.D. POINTER SHOULD NOT BE REQUIRED TO SEEK VVAL APPROVAL TO ASSERT HER CLAIM.

Although the Fifth Circuit admits that

creditors have standing to assert a stay violation, it now requires a creditor, such as Pointer in the VVAL case, to move the Bankruptcy Court for authorization to act on behalf of the trustee or debtor-in-possession, relying on In re Savino Oil & Heating Co., 91 B.R. 655, 656-57 (Bankr. E.D. N.Y. 1988). In view of the circumstances of this case, such requirement is ludicrous and conflicts with decisions from other Circuits. See, e.g., In re McKeesport Steel Castings Co. v. Equibank, 799 F.2d 91 (3rd Cir. 1986).

After Pointer foreclosed her lien on the apartment complex, the property on which the Taxing Units asserted liens was no longer "property of the VVAL estate." As such, the Chapter 7 trustee in the VVAL case would have no reason to bring his own avoidance action or object to Pointer's request to assert such an action on her own. Furthermore, the VVAL trustee, after the foreclosure, would have no

standing to bring such action, nor would the VVAL court have jurisdiction to consider such matter. See In re Dickenson Lines, Inc., 47 B.R. 653 (Bankr. 3rd Div. Minn. 1985).

The Court in In re Chernicky Coal Co., Inc., 67 B.R. 828, 832 (Bankr. W.D. PA. 1986) cited in the Court of Appeals' Opinion in this case, correctly points out that when appropriate circumstances are shown, a creditor who did not seek authorization from the Bankruptcy Court could nevertheless assert a claim under § 549. Such circumstances were shown in the case at bar. The Chapter 7 trustee and the Debtor in the VVAL case had no reason, standing, nor jurisdiction to file a claim against the Taxing Units because the property was no longer property of the VVAL estate after Pointer foreclosed.

The Fifth Circuit should have followed Chernicky and its own reasoning in In Re Louisiana World Exposition, Inc., 832 F.2d 1391 (5th Cir. 1987) in which it said that the general

requirements [(1) the creditor's claim be colorable; (2) the debtor-in-possession unjustifiably refuse to pursue the claim, and (3) that the creditor first receive leave to sue from the Bankruptcy Court], are relevant but not necessarily a formalistic checklist. Id. at 1397. In Louisiana World, the Court found standing after discovering that the creditor's committee raised a serious question of bankruptcy law, and after concluding that the Debtor would not have sought the relief even if the committee had filed a formal request.

A situation similar to Louisiana World was presented to the Court with the Pointer case. This case involves the serious question of whether the alleged "automatic" perfection of ad valorem tax liens under state law violates the automatic stay. This serious issue has divided the Circuits. Compare In re Parr Meadows Racing Ass'n., 880 F.2d 1540 (2nd Cir. 1990) cert. denied, 110 S. Ct. 869 (1990), and Equibank,

N.A. v. Wheeling-Pittsburg Steel Corp., 884 F.2d 80 (3rd Cir. 1989), with Maryland Nat'l Bank v. Mayor and City Council of Baltimore, (4th Cir. 1983). Furthermore, the VVAL trustee could not pursue the claim since the property was no longer in the VVAL estate.

As in the Louisiana World case, the Fifth Circuit should have found it "...inappropriate and unnecessary to now go through the empty, formalistic ritual of remanding the case so that [Pointer] may more particularly seek action from the [VVAL] trustee and prior permission from the [VVAL] Bankruptcy Court, with obviously preordained results..." Id. at 1397.

Pointer as a creditor in the VVAL case has standing to claim that the automatic stay imposed by the VVAL petition prevented the Taxing Units from asserting tax liens for 1987 and 1988. Pointer should not be compelled to seek VVAL Court permission to assert such a claim when the property involved is no longer property of the VVAL

estate, and that court no longer has jurisdiction. Alternatively, the Fifth Circuit should have remanded the case to allow Pointer to seek such authority.

1.E. CASES RELIED UPON BY COURT OF APPEALS ARE DISTINGUISHABLE.

The Fifth Circuit's reliance on In re Savino Oil & Heating Co., 91 B.R. 655 (Bankr. E.D. N.Y. 1988), is erroneous. Unlike the Pointer case, Savino involved the question of whether an individual creditor, rather than the debtor-in-possession or the creditors' committee, could assert an avoidance action in a Chapter 11 case. The Savino Court held that in order to preserve the orderly bankruptcy administration, an individual creditor would be granted such authority only upon a showing of extraordinary circumstances. In the Pointer case, extraordinary circumstances exist since the property involved is no longer property of the VVAL estate and no

other person or entity had asserted the violation. In Savino, the creditors' committee had already instituted an adversary proceeding to recover a fraudulent conveyance. There was no such pending suit in the VVAL bankruptcy. Savino is clearly distinguishable.

In In re Toledo Equipment, 35 B.R. 315 (Bankr. N.D. Ohio 1983), also relied upon by the Fifth Circuit, the Court was concerned that allowing a Chapter 11 creditors' committee to assert a fraudulent conveyance action before seeking prior Court approval and a determination as to the debtor's failure to act, could jeopardize the debtor-creditor relationship and a successful reorganization. Since the VVAL case was filed under Chapter 7, a successful reorganization was not possible, a fact which clearly distinguishes Toledo from this case.

In both Toledo and In re Curry & Sorenson, Inc., 57 Bank. 824 (9th Cir. BAP 1986), the Courts' dismissals based on standing were without

prejudice to the real parties in interest' right to assert an action. Toledo at 320; Sorenson at 829, Note 4. Pointer, as owner of the property on which the Taxing Units assert a claim, is the real party in interest and the Fifth Circuit erred in not remanding the case to allow her to seek VVAL court permission if such permission is now necessary.

The Third Circuit Court of Appeals in McKeesport Steel Castings Co. v. Equibank, 799 F.2d 91 (3rd Cir. 1986), ruled that individual creditors may act in lieu of the trustee when sufficient reason exists. In Pointer's case, such reasons exist. First, Pointer as the owner of the property, now stands in the shoes of the VVAL trustee and is a debtor-in-possession in her own case. The orderly administration of her own case demands that the validity of the alleged tax liens be decided on the merits. The Taxing Units should not be rewarded for sitting on their hands and refusing to file a motion to modify the stay

to permit their post-petition liens to attach. This procedure is required of all other creditors and the Taxing Units should not be afforded special treatment. Such delay unjustifiably prolongs any legitimate effort to collect the taxes and now jeopardizes Pointer's hopes of a successful reorganization. Pointer was the only party in the case to take action by filing her complaint, although § 362 of the Code clearly requires the party seeking to annul the stay to file for relief. Matter of Reserves Development Corp., 821 F.2d 520 (8th Cir. 1987).

Recently, the Court of Appeals for the First Circuit in In re Parque Forestal, Inc., No. 90-2174 slip op. (1st Cir. Nov. 19, 1991), followed the Third Circuit's Opinion in McKeesport, and allowed recovery by third parties who equitably come to stand in the trustee's shoes. In doing so, the First Circuit cited the Fifth Circuit decision in Matter of Delta Towers, Ltd., 924 F.2d 74 (5th Cir. 1991) in support of its

holding. The Fifth Circuit's decision in this case is contrary to its holdings and reasonings in the Louisiana World and Delta Towers cases and departs from the usual and accepted course of judicial precedent based on *stare decisis*.

For all of the foregoing reasons, Pointer clearly has standing to challenge the Taxing Units purported liens. The Court of Appeals failed to properly consider Pointer's standing when it *sua sponte* raised the issue without allowing the parties a reasonable opportunity to brief and argue the point. Had such opportunity been afforded the parties, the Court would have found standing and would have squarely confronted the serious issues presented by this case. In the face of the Court of Appeals' failure to decide the true issues presented, this Honorable Supreme Court should now accept this case for review and announce the law of the land concerning the issues presented.

QUESTION NO. 2 RESTATED

Does a Chapter 11 "Debtor-In-Possession," such as Pointer, have standing to seek a determination as to the validity, extent and priority of ad valorem tax claims against real property of the estate requesting a declaration that the claims did not attach to real property owned by the Debtor because of violation of the automatic stay imposed by 11 U.S.C. § 362 in her bankruptcy proceeding and a previous bankruptcy proceeding where she was a creditor.

The Fifth Circuit completely ignored Pointer's standing as a "debtor-in-possession" in her own bankruptcy. An analysis of Pointer's standing under the various Code provisions as both a debtor-in-possession in her own bankruptcy and a creditor in the VVAL case supports her statutory standing.

2.A. POINTER HAS STANDING UNDER § 545 AS A DEBTOR IN HER OWN CASE AND AS A CREDITOR IN THE VVAL CASE.

On January 1 of each tax year, a tax lien allegedly automatically attaches under state law for all taxes ultimately imposed for that year. Tex. Prop. Tax Code § 32.01 (Vernons 1982). In relying on this state statute, the Taxing Units contend that their claims for 1987 and 1988 taxes were secured on January 1, 1987 and January 1, 1988, respectively, notwithstanding the § 362 automatic stay.

Section 545(2) of the Code permits a trustee or debtor under § 1107 to avoid the fixing of a statutory lien on property of the debtor to the extent such lien:

> "is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists." 11 U.S.C. § 545(2).

On the date of her filing on November 16, 1987, Pointer as a debtor-inpossession had the power of a hypothetical bona fide purchaser of the

Property under § 545. Since the Taxing Units' purported lien for 1987 was neither perfected nor enforceable due to the automatic stay previously imposed on April 25, 1986 in the VVAL case, Pointer, standing in the shoes of the VVAL trustee, may avoid the lien under § 545.

Both the Pointer stay and the VVAL stay prevented the attempted January 1, 1988, automatic perfection of the Taxing Units' liens for 1988 taxes. Pointer, as a debtor-in-possession, clearly has standing to avoid the alleged January 1, 1988, "automatic" fixing of the statutory lien for 1988 ad valorem taxes because of her powers under § 545(2) which arose on November 16, 1987, with the filing of her petition.

In Kalb v. Feuerstein, 308 U.S. 433 (1939), this Court noted that Congress, because of its plenary power over bankruptcy, may render acts taken with respect to the person or property of the debtor nullities and subject to collateral attack. Congress has granted such power with 11 U.S.C. §

362. The Fifth Circuit's opinion that the Taxing Units' automatic creation of tax liens constituted a "transfer" of debtor's property presumes the acts were not void. The Court's opinion that a stay violation was not a void act conflicts with this Court's Opinion in Kalb and other Circuit Courts of Appeal.

2.B. POINTER HAS STANDING PURSUANT TO 11 U.S.C. § 505.

Although the Fifth Circuit Appellate Panel found that Pointer had constitutional and prudential standing, it declined to find that she had statutory standing. The Court limited its review to §§ 362(h) and 549(a) of the Code to determine whether Pointer, as a creditor in the VVAL case, had statutory standing in the VVAL case to assert the illegality of the Taxing Units' purported tax liens. Pointer, however, did not file a complaint in the VVAL case under the sections relied upon by the Fifth Circuit, i.e., §§ 362(h)

or 549(a). She filed a complaint in her own bankruptcy action seeking a declaration that the taxing authorities have no liens against her property for 1987 and 1988. Accordingly, the Court of Appeals should have reviewed Pointer's standing to assert the invalidity of the purported tax liens in her own bankruptcy case, not the VVAL case.

Pointer's complaint sought to determine the validity of the alleged tax liens as authorized by 11 U.S.C. § 505(a)(1) which states:

> "Except as provided in paragraph (2) of this subsection, the Court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to a tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction." (emphasis added).

Pointer clearly has statutory standing under § 505 (a)(1). To determine whether she has the requisite prudential standing, the Court should consider the following three concerns in determining whether

Pointer has prudential standing to assert such claim:

1. Whether her complaint falls within the zone of interest protected by the statute or constitutional provision at issue;

2. Whether the complaint raises abstract questions amounting to generalized grievances which are more appropriately resolved by the legislative branches; and

3. Whether Pointer is asserting her own legal rights and interests rather than the legal rights and interests of third parties.

See Valley Forge Christian College v. Americans United, 454 U.S. 464, 471 (1982).

When considering these concerns in Pointer's own bankruptcy under § 505 of the Code, it can easily be seen that Pointer had standing to assert that the tax liens claimed by the Taxing

Units did not attach to her real property due to the automatic stay in the VVAL bankruptcy.

Section 505 authorizes the bankruptcy court to rule on the merits of any tax claim involving an unpaid tax, fine, or penalty relating to a tax, or any addition to a tax, of the debtor or the estate. H.R. Rep. No. 595, 95th Cong., 1st Sess. 356 (1977). The automatic stay of § 362 prohibited the automatic perfection of the Taxing Units' alleged liens to protect creditors of VVAL, such as Pointer, and § 505 gives her standing to assert the invalidity of the Taxing Units' claims in her own bankruptcy. Had she not been in bankruptcy, she would have had the right to seek a declaration under 28 U.S.C. § 2201 et seq. that the automatic stay in the VVAL bankruptcy prohibited the automatic perfection of the lien and as a result, she purchased the apartments free of the Taxing Units' alleged liens. Since she was in bankruptcy, § 505 gave her standing to assert this claim in her own bankruptcy case. This is precisely what Pointer

did in this case; she requested the Bankruptcy Court to rule on the merits of the Taxing Units' tax claims in her case. The first prudential concern is met.

Pointer's Complaint clearly does not raise abstract questions concerning generalized grievances. It raises specific questions concerning the application and interpretation of federal statutes, which is within the exclusive province of the judicial branch, and upon which different Circuits disagree. Pointer requested the Court to declare the merits of the Taxing Units' purported liens on her property, which directly concerns the administration of her bankruptcy estate and is a core proceeding. See 28 U.S.C. § 157. In reviewing Pointer's standing, all material allegations of Pointer's Complaint must be construed in her favor. Warth v. Seldin, 422 U.S. 490, 501 (1975). Her Complaint against the Taxing Units is very specific, and is neither abstract nor general. The second prudential concern is met.

Pointer is clearly asserting her own legal rights under §§ 362 and 505 as well as 28 U.S.C. §§ 2201 and 157 for a declaration concerning the merits of the Taxing Units' claims to her property. She has the right to assert in her own bankruptcy case, under § 505, that § 362 prohibited the automatic perfection of the liens in question and that, therefore, she purchased the apartments free of those liens. Furthermore, she has the right to seek a similar declaration under 28 U.S.C. § 2201 independent of her own bankruptcy action. The third and final prudential concern exists. Pointer has standing under § 505.

2.C. POINTER HAS STANDING PURSUANT TO 28 U.S.C. § 2201.

Title 28 U.S.C. § 2201 provides:

"In a case of actual controversy within its jurisdiction . . ., any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201 (1979). (emphasis added).

A request that a tax lien be declared void

constitutes an attempt to have the Court issue a declaratory judgment. Horne v. U.S., 519 F.2d 51, 52 (5th Cir. 1975). In reviewing a lower Court's declaratory judgment, the Fifth Circuit's inquiry was limited to determining whether there was an abuse of discretion. Roman Companies, Inc. v. Griffin, 876 F.2d 26, 29 (5th Cir. 1989). Clearly, the Bankruptcy Court's and District Court's determination that the Taxing Units' liens for 1987 and 1988 was not abuse of discretion when viewed in light of the purposes of 11 U.S.C. §§ 505 and 362 and considering the amendment to 28 U.S.C. § 2201. Standing exists under 28 U.S.C. § 2201.

2.D. THE FIFTH CIRCUIT APPELLATE PANEL MISAPPLIED THE LAW ON STANDING.

As previously stated, the Fifth Circuit's *sua sponte* review of the issue of standing looked only to Pointer's creditor position in the VVAL bankruptcy case. The Court did not address Pointer's standing to file in her own bankruptcy case a complaint to declare the merits of the

Taxing Units' claim. Pointer is not claiming that the Taxing Units' lien claims are post VVAL petition transfers avoidable under § 549(a) as found by the Fifth Circuit. Pointer's pleadings in the lower Courts and her brief in the Court of Appeals contend that the automatic stay imposed by § 362 at the inception of the VVAL case prohibited the automatic perfection of the tax liens in question and, therefore, when she purchased the apartments at the foreclosure sale, the tax liens had not attached and she acquired the property free of tax liens for 1987 and 1988. It is very important to note that she is not asking the Court to undo something that has occurred, as erroneously found by the Court of Appeals; rather, she seeks a declaration that an event never occurred, as found by the lower Court. See In re Jackson v. West, 102 B.R. 82, 83 (Bankr. N.D. Tex. 1988). By limiting its review of standing to § 549(a), the Fifth Circuit misapplied the facts of this case to the applica-

ble law, and misinterpreted the contention of Pointer and the relief sought. This Court should find standing.

In re Brooks, 871 F.2d 89 (9th Cir. 1989), aff'g. 79 B.R. 479 (9th Cir. BAP 1987), relied on by the Court of Appeals is distinguishable for a number of reasons. In Brooks, the trustee in the wife's bankruptcy case attempted to avoid a deed of trust lien that was re-recorded after her husband's prior bankruptcy petition was filed, but before her own petition had been filed. The Court found the trustee in the wife's case had no standing under § 549(a) to avoid the lien on the ground that it was re-recorded during the husband's bankruptcy.

There was no allegation by the husband or the wife in either bankruptcy that the deed of trust lien never attached to the collateral, as alleged by Pointer. To be applicable to the Pointer case, the facts of the Brooks case would have to be altered to provide that Mr. Brooks was in bankruptcy at the time of the original filing of

the deed of trust document. Since he was not in bankruptcy at that time, Brooks is clearly distinguishable - in Pointer, VVAL was in bankruptcy on the date (i.e. 1987 and 1988) the Taxing Units contend the liens automatically attached.

Secondly, and importantly, Brooks found that because of the community property laws of Washington, Mrs. Brooks was in effect estopped by her husband's election not to invoke the protection of § 362 with respect to the re-recording of the deed of trust. The community property laws of Texas have no bearing on the Pointer case. Accordingly, unlike the Brooks case, VVAL's choice in not filing a complaint for a declaration that the Taxing Units' liens did not attach should not prevent Pointer from seeking such relief.

In footnote 1, Brooks expressly declined to decide the issue of whether a creditor, such as Pointer, may bring an action, such as under § 505

or 28 U.S.C. § 2201, to enforce the protection of §362. Id. at 90. Accordingly, Brooks expressly distinguished itself from this case.

Finally, since the lien in Brooks did not involve a tax claim, the standing afforded a debtor under § 505 was not applicable as it is in Pointer's case.

For the foregoing reasons, Pointer, as a debtor-in-possession, has standing to seek a determination as to the validity, extent and priority of the alleged claims of the Taxing Units.

QUESTION NO. 3 RESTATED

Does the automatic stay imposed by 11 U.S.C. § 362 prevent post-petition "automatic perfection" of ad valorem taxes against real property of the bankrupt estate?

The Taxing Units do not hold valid liens against The Property for postpetition ad valorem

taxes that became due in 1987 and 1988 because the automatic stay imposed by § 362 of the Bankruptcy Code prohibited the creation or perfection of any tax liens for 1987 and 1988, and the exception to the automatic stay provided by §§ 362(b)(3) and 546(b), jointly, does not permit the attachment of such liens.

3.A. THE FIFTH CIRCUIT'S DECISION DENYING POINTER'S STANDING ERRONEOUSLY ADOPTS BY MERE IMPLICATION THE MINORITY VIEW IN MARYLAND BANK v. MAYOR AND CITY COUNCIL OF BALTIMORE, 723 F.2d 1138 (4th Cir. 1983), AND IS IN CONFLICT WITH THE THIRD CIRCUIT'S DECISION IN EQUIBANK v. WHEELING PACIFIC STEEL CORP., 884 F.2d 80 (3rd Cir. 1989).

The Court of Appeals opinion states that "the gravamen of Pointer's Complaint is that the attachment of ad valorem tax liens under Texas law for 1987 and 1988 constituted a transfer of

VVAL estate property which occurred after the commencement of the VVAL case and without authorization under the Bankruptcy Code or by the VVAL Bankruptcy Court." (Page 11 of Opinion). As such, the Court of Appeals considered such attachment to be a post-petition transfer that could be avoided only under the § 549 powers belonging solely to the Trustee in the VVAL case. This reasoning presupposes that the liens attached. Such reasoning is contrary to the clear meaning of § 362, and decided Issue No. 1, as briefed by the parties, against Pointer and contrary to the holdings of other Circuit Courts of Appeals. The Court indirectly decided the issue of whether "passive genesis" of tax liens violate the automatic stay without a thorough examination and explanation of its reasons for adopting the minority position on this issue. Such a profound and wide reaching decision in the Fifth Circuit deserves more than a passing glance, and should be decided by squarely

confronting the issue and statute (§ 362) involved. The Fifth Circuit's decision perpetuates and spreads a conflict amongst various Circuits which now mandates intervention by this Honorable Court to establish a single rule to be applied equally in all Circuits.

3.B. AUTOMATIC LIEN PERFECTION V. THE AUTOMATIC STAY.

The crucial provision of the Texas Property Tax Code states:

> "On January 1 of each year, a tax lien attaches to property to secure the payment of all taxes, penalties and interest ultimately imposed by the year on that property..." Tex. Prop. Tax Code § 32.01 (Vernons 1982).

The filing of a bankruptcy petition invokes § 362(a) of the Bankruptcy Code, which "operates as a stay, applicable to all entities of . . . (4) any act to create, perfect, or enforce any lien against property of the estate . . . ." 11

U.S.C. § 362(a) (4), (emphasis added). The phrase "all entities" include governmental units such as the Taxing Units in this case. 11 U.S.C. §101(14).

The automatic stay preserves the Bankruptcy Code's goal of ensuring equal treatment among creditors; thus, all creditors, public and private, are within its purview. In re Parr Meadows Racing Association, 880 F.2d 1540, 1545 (2d Cir. 1989), cert. denied, 110 S. Ct. 869 (1990).

Although the automatic stay does not affect the secured status of a tax claim that had already attained lien status prior to the petition date, it does prevent the post-petition creation or perfection of a tax lien. Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp., 884 F. 2d 80, 84 (3rd Cir. 1989). Section 362(a)(4), prevented the "automatic" attachment to the Property of the Taxing Units' liens to secure payment of the 1987 and 1988 taxes because such

liens would not have arisen under Texas law until January 1 of each such year, after the automatic stay arose in the VVAL case on April 25, 1986, and in the Pointer case on November 16, 1987. Id. at 85 (citing In re Carlisle Court, Inc., 36 Bankr. 205, 214 (Bankr. D.C. 1983); (Court permission was required to impose a a lien after the stay arose.) See also Tex. Prop. Tax Code Ann. § 32.01 (Vernon 1982).

The Taxing Units argue that because tax liens attach automatically by operation of law under the Tax Code, such attachment in 1987 and 1988 did not constitute an "act" that is prescribed by § 362(a)(4). This argument fails for two reasons. First a review of the Texas property taxation process set forth in Bankruptcy Court's Memorandum Opinion (See Appendix) confirms that, under Texas law, numerous acts are involved in the process of creating and perfecting ad valorem tax liens and determining the amount of taxes that such liens secure. See

Parr Meadows, 880 F.2d at 1544-45 (court lists the acts that, under the New York statutory taxation scheme, create and perfect tax liens). Second, even if the tax liens are created and perfected by operation of law, i.e., without any affirmative "act", any such liens that attach post-petition nevertheless violate the automatic stay. Id. at 1545 (cited in In re Guterl Special Steel Corp., 95 Bankr. 370 (W.D. Pa. 1989); In re Bellman Farms, Inc., 86 Bankr. 1016, 1020 (Bankr. D.S.D. 1988)(automatic creation and perfection of post-petition tax liens by operation of law violates automatic stay). Without Court permission, such "automatic" attachment would violate the stay.

The Taxing Units further argue that the language "whether or not the taxes are imposed in the year the lien attaches" of § 32.01 of the Tax Code confirms that the tax lien attaches without any "act" and regardless of any future assessment. When reviewing the statute as a

whole, however, the Taxing units' interpretation is erroneous. Section 32.01 states:

> "On January 1, of each year, a tax lien attaches to property to secure the payment of all taxes, penalties and interest ultimately imposed for the year on that property, whether or not the taxes are imposed in the year the lien attaches. The lien exists in favor of the state and each taxing unit having the power to tax the property." Tex. Prop. Code Ann. § 32.01 (Vernons 1982). (emphasis added)

If the Taxing Units' position was correct, on January 1 of the first year Texas adopted this statute the Taxing Units' received a perfected lien for all past and future taxes. If the Texas legislature had intended for a tax lien to attach without any "act" for all taxes assessed in the future, it would not have included the language "on January 1 of each year" as it did in § 32.01. Clearly, this provision of the Tax Code is intended to impose a lien on January 1 for taxes assessed in the current year only. Any other interpretation makes the language "on January 1

of each year" meaningless.

The Taxing Units' reliance on Stanford v. Butler, 826 F.2d 353 (5th Cir. 1987) for the proposition that tax liens in Texas arise without any "act" is meritless. Stanford v. Butler was correctly followed by the Bankruptcy Court and the District Court in this case. In Stanford the Court found that the tax liens created on January 1, 1982, secured taxes dating as far back as 1966, because in that case the petition was filed in September of 1982. Id. at 354. Taxes for years subsequent to the petition year were not an issue on appeal and in fact the debtor in that case conceded that they were unsecured priority claims. See Id. at 354 & Note 1. Stanford v. Butler did not involve the alleged post-petition "automatic" perfection of tax liens.

The Taxing Units, as all creditors, must seek and obtain permission from the bankruptcy court to perfect their lien claims post-petition. Just as the post-petition filing and recording of

a deed of trust or UCC lien does not perfect a lien, the purported "automatic" provisions of the Texas Tax Code does not automatically give the Taxing Units a lien. The bankruptcy stay preempts the "automatic" provisions of state law and requires permission from the Court.

For all of the foregoing reasons, the Tax Units' argument that the "automatic" attachment of tax liens in 1987 and 1988 did not violate § 362(a)(4) because no "act" occurred to create the liens, is without merit.

3.C. THE SUPREMACY CLAUSE MANDATES THAT THE FEDERAL AUTOMATIC STAY SUPERSEDES THE OPERATION OF TEXAS TAX LIEN STATUTES.

Because § 362(a)(4) of the Bankruptcy Code and § 32.01 of the Texas Property Tax Code are inconsistent, and because application of the state statute would frustrate the purpose of the federal statute, the state statute is preempted by the federal statute in this case. Perez v.

Campbell, 402 U.S. 637, 91 S. Ct. 1704 (1971); see also Maryland v. Louisiana, 451 U.S. 724, 748, 101 S.Ct. 2114, 2129 (1981)(a state statute is void to the extent it conflicts with the federal statute, e.g., if compliance with both federal and state provisions is impossible).

Applying the standards Perez set forth, this Court must consider the relative purpose of § 32.01 of the Tax Code and the federal automatic stay. The obvious purpose of §32.01 is to assist taxing authorities in collecting taxes from the owners of real property. The Bankruptcy Code's automatic stay is intended to protect the debtor, its creditors, and its estate from the attachment of further liens, and to prevent the pilfering of the debtor's estate after the bankruptcy petition is filed. H.R. No. 95-595, 95th Congress, 1st Sess. 340-42 (1977); S.R. 95-989, 95th Congress, 2nd Sess., 49-51 (1978)("The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue

their own remedies against the debtor's property."); see also In Re Stringer, 847 F.2d 549, 551 (9th Cir. 1988)(one purpose of the automatic stay is to protect the relative position of creditors).

The Fifth Circuit's Opinion in this case presumes the Taxing Units' post-petition liens attached to the property and thus can only be avoided under § 549 of the Bankruptcy Code. Such analysis implies post-petition tax liens do not violate the automatic stay. Such a decision should not be reached by implication but by squarely addressing the issue. This warrants this Court's intervention to decide the issue on the merits.

CONCLUSION

The Court of Appeals' dismissal of Pointer's complaint after a *sua sponte* review of standing was an extreme departure from the usual course of judicial proceedings and calls for this Court's

power of intervention. Pointer has the requisite standing to maintain her complaint. If she does not, her case should be remanded, not dismissed.

This case presents the Supreme Court with a unique opportunity to resolve three separate significant disputes among various Circuits:

1. whether a violation of the automatic stay is void or voidable;

2. whether bankruptcy court permission is required before a creditor has standing to seek redress for a violation of the automatic stay; and

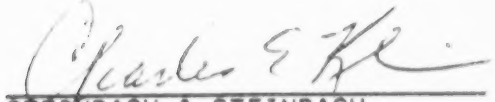
3. whether the automatic stay preempts state law and prevents the automatic perfection of ad valorem tax liens.

Petitioner urges this Honorable Court to seize upon this opportunity to resolve this conflict for the benefit of all concerned.

PRAYER

Petitioner, Martha Jo Pointer, respectfully urges this Honorable Court to grant her Application for Writ of Certiorari and thereupon reverse the judgment of the Court of Appeals and affirm the judgment of the District Court in all respects. Alternatively, Petitioner Martha Jo Pointer requests this Honorable Court to grant her application and thereupon reverse the judgment of the Court of Appeals, remand this case, and instruct the Court of Appeals to consider the merits of the Taxing Units' appeal as originally briefed by the parties. Petitioner prays for general relief, at law or in equity, and for such other and further relief to which she may show herself justly entitled.

Respectfully submitted,



STEINBACH & STEINBACH,
A Professional Corporation
R. Scott Steinbach,
Counsel of Record
Texas Bar No. 19131400
Charles E. Klein
Texas Bar No. 11556500
Wellington Centre, Suite 325
14693 Dallas Parkway
Dallas, Texas 75240
Telecopier: (214) 960-8815
Telephone: (214) 960-1850

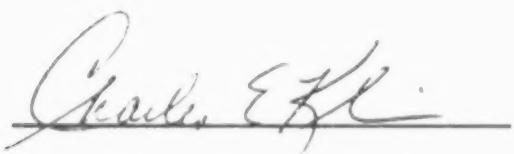
ATTORNEYS FOR PETITIONER
MARTHA JO POINTER

Certificate of Service

I hereby certify that a true and correct copy of Petitioner Martha Jo Pointer's Petition for Writ of Certiorari was served on the parties listed below via hand delivery or certified mail, return receipt requested, postage prepaid, on this 11th day of May, 1992:

Earl Luna, Esq.
Steven L. Eason, Esq.
Michael L. Atchley, Esq.
LAW OFFICES OF EARL LUNA, P. C.
4411 N. Central Expressway
Dallas, TX 75205
(214) 521-6001
ATTORNEYS FOR CARROLLTON I.S.D.

James E. Porter, Esq.
PERDUE, BRANDON & FIELDER
P. O. Box 13430
Arlington, TX 76094-0430
(817)461-3344
ATTORNEYS FOR CITY OF FARMERS BRANCH



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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-7072

IN THE MATTER OF: MARTHA JO POINTER,
Debtor.

CITY OF FARMERS BRANCH and
CARROLLTON-FARMERS BRANCH
INDEPENDENT SCHOOL DISTRICT,

Appellants,

v.

MARTHA JO POINTER,

Appellee.

Appeal from the United States District Court
for Northern District of Texas

(January 14, 1992)

Before KING, JOHNSON and EMILIO M. GARZA, Circuit judges, King, Circuit Judge.

Carrollton-Farmers Branch Independent School District and the City of Farmers Branch (collectively), the "Taxing Units") appeal from an

Order of the district court affirming the bankruptcy court's determination that the automatic stay of 11 U.S.C. § 362f barred the Taxing Units from obtaining tax liens for post-petition ad valorem property taxes for the years 1987 and 1988 on property currently owned by Martha Jo Pointer. The Taxing units also appeal the lower courts' determination that they are not entitled to post-petition penalties, fees, and costs for unpaid 1985 and 1986 ad valorem property taxes secured by valid liens.

The principal question presented for our review, and one extensively briefed by the parties amici curiae, is whether Texas ad valorem tax liens, which arise by operation of law, *violate the automatic stay when they attach, post-petition, to property of a bankruptcy estate. This is an issue that has divided the circuits,* compare *In re Parr Meadows Racing Ass'n., 880 F.2d 1540, 1546 (2d Cir. 1989) (property tax liens arising post-petition by operation of law violate stay),* cert.

denied, 110 S. Ct. 869 (1990), and Equibank, N.A. v. Wheeling-Pittsburg Steel Corp., 884 F.2d 80, 84 (3d Cir. 1989) (same), with Maryland Nat'l Bank v. Mayor of Baltimore, 723 F.2d 1138, 1142-43 (4th Cir. 1983) (property tax liens arising post-petition by operation of law do not violate stay. 2 We are unable to address this issue here, however, because we hold that Pointer lacked standing under the Bankruptcy Code to avoid the post-petition tax liens as violative of the stay. We are therefore compelled to reverse the judgment below as to that issue. As to the Taxing Units' claim for post-petition penalties, fees, and costs for unpaid taxes secured by the valid, pre-petition liens, we affirm the judgment of the district court.

I. FACTS AND PROCEDURAL HISTORY

The facts in this case are stipulated. Gerald Pointer built an apartment complex in Farmers Branch, Texas. He owned the complex, which he called the "Valwood Village Apartments", until 1977, when he sold the complex. As partial

consideration for the sale, Gerald Pointer accepted a promissory note secured by a deed of trust that granted him a lien on the apartment complex. In 1982, Gerald Pointer divorced his wife, Martha Jo Pointer. In the divorce decree, Martha Jo Pointer ("Pointer") was awarded the promissory note and the deed of trust on the Valwood Village Apartments.

During the early 1980s, ownership of the Valwood Village Apartments frequently changed hands. All transfers of the property, however, remained subject to the lien that Pointer held on the property. In 1986, Valwood Village Apartments, Ltd. ("VVAL") owned the apartment complex. VVAL was forced into involuntary bankruptcy on April 25, 1986. Its bankruptcy case is currently pending in the Northern District of Texas.

On November 16, 1987, Pointer herself filed a petition for relief under Chapter 11 of the United States Bankruptcy Code. Three months later, Pointer filed a motion for relief from the automatic stay in the VVAL bankruptcy proceedings. On

June 9, 1988, the automatic stay to permit Pointer to foreclose her lien on the Valwood Village Apartments. Pointer conducted a foreclosure sale of the property where she was the high bidder and consequently purchased the apartment complex.

The Taxing Units filed a proof of claim against the Pointer estate seeking, inter alia, payment of the taxes allegedly secured by the liens at issue, and penalties, fees, and costs attributable to the unpaid taxes. On January 16, 1990, Pointer filed an adversary proceeding to determine the extent and validity of the ad valorem tax liens claimed by the Taxing Units for the years 1987 and 1988. Pointer argued that § 362(a)(4) of the Bankruptcy Code prohibited the Taxing Units from taking any action to create or perfect any tax liens against the apartment complex after April 25, 1986, the date on which the involuntary petition against VVAL was filed. 3 The bankruptcy court agreed, ruling that the Taxing units held valid tax liens against the Valwood Village Apartments to secure ad valorem

property taxes for the pre-petition year of 1985 and for 1986, the year in which the VVAL bankruptcy was filed, but that they did not hold valid tax liens for the post-petition years of 1987 and 1988. Pointer's complaint also alleged that the Taxing Units' liens for 1985 and 1986, the validity of which she does not contest, do not secure the payment of post-petition penalties, fees, or costs. The bankruptcy court again agreed, ruling that the valid 1985 and tax liens did not secure the payment of penalties, fees, and costs for Pointer's non-payment of the 1985 and 1986 taxes. The district court affirmed in all respects the judgment of the bankruptcy court.

On appeal, the Taxing units content that the automatic stay should not prevent them from obtaining tax lien status for post-petition 1987 and 1988 taxes. The Taxing Units also contend that they are entitled to penalties, fees, and costs on the unpaid ad valorem taxes secured by valid liens for the pre-petition years 1985 and 1986.

II. VALIDITY OF POST-PETITION LIENS

Pointer contends that the post-petition ad valorem tax liens on the apartment complex are invalid because their attachment violated the automatic stay of 11 U.S.C. § 362. The issue of whether Pointer, as a creditor of the VVAL estate, has standing to seek avoidance of the tax liens as violative of the VVAL automatic stay is a threshold issue and one of first impression in this circuit.

The question of whether a creditor has standing to seek relief for an alleged violation of the automatic stay by another creditor requires two separate inquiries. The first is whether the creditor has standing under the Constitution and certain prudential concepts that have developed to limit constitutional standing. The second is whether the creditor has standing under the Bankruptcy Code. We address these inquiries in turn.

A. Constitutional and Prudential Standing

The Supreme Court in Warth v. Seldin, 422 U.S.

490, 498-99 (1975), stated that a plaintiff's standing depends on "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warranty his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." The test for standing includes elements mandated by Article III as well as non-constitutional prudential considerations. 6A James W. Moore & Jo Desha Lucas, Moore's Federal Practice ¶ 57.11, at 57-93 (2d ed. 1991). The Court summmarized these elements in Gladstone, Realtors 7 Village v. Bellwood. 441 U.S. 91, 99-100 (1979) (footnotes and citations omitted). In order to assert constitutional standing, a plaintiff must therefore allege (1) a personal injury (2) fairly traceable to the defendant's allegedly unlawful conduct, which is (3) likely to be redressed by the requested relief. Allen v. Wright, 468 U.S. 737, 751 (1984).

Pointer can certainly show here that she has suffered palpable injury, which was caused by the

Taxing Units' alleged stay violations. If the actions by the Taxing Units to create and perfect the ad valorem tax liens are deemed valid, Pointer's property may well be seized to satisfy VVAL's delinquent taxes. Finally, the bankruptcy court can redress her "injury" by voiding the tax liens as violative of the stay. We find that Pointer's assertion of standing does not offend Article III's minimum requirements or any prudential considerations that might limit her ability to bring suit.

B. Statutory Standing

Having found that the assertion of standing by Pointer passes constitutional muster, we now must determine whether Pointer has statutory standing under the Bankruptcy Code to seek relief for an alleged stay violation by another creditor. The particular type of stay violation with which we are concerned in this case is an act against property of the debtor's estate. The Taxing Units assert that they have liens arising under Texas law

against property of the VVAL estate, specifically the Valwood Village Apartments, which secure the payment of post-petition 1987 and 1988 ad valorem taxes. Pointer relies, in response, on § 362 of the Bankruptcy Code which provides, in pertinent part, as follows:

> (a) . . . [The filing of a bankruptcy] petition . . . operates as a stay, applicable to all entities, of - . . .
> (4) any act to create, perfect, or enforce any lien against property of the estate [.]

11 U.S.C. § 362. Pointer contends that the words "any act" include the attachment of tax liens that arise by operation of law.

We turn to two sections in the Bankruptcy Code which address the question of standing to bring suit for violations of the automatic stay. The first section need not long concern us because it authorizes suits to obtain a form of relief different from that sought by Pointer. Specifically,

§ 362(h), which was added to the Bankruptcy Code in 1984, provides that "[a]n individual injured by any willful violation of a stay provided by [§ 362] shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

This Court has addressed § 362(h) in the context of a suit by the debtor. In Pettitt v. Baker, 876 F.2d 456 (5th Cir. 1989), we held that § 362(h) creates a private right of actin for one (there, the debtor) injured by a private right of action for one (there, the debtor) injured by a willful violation of the stay. Id. at 457 (creditors willfully violated stay by filing several pleadings in state court following the filing of the debtor's bankruptcy petition). The instant case does not require us to decide whether the private right of action in § 362(h) extends to creditors as well. We note that the District Court for the Western District of Louisiana has determined that § 362(h) does provide for a right of action by a creditor.

In Homer National Bank v. Namie, 96 B.R. 652 (W.D. La. 1989), Chief Judge Stagg held that § 362(h), on its face, allows creditors to assert stay violations. According to the court, "[i]f Congress intended to limit the remedies of § 362(h) to debtors it could have done so by the simple expedient of replacing the term 'individual' with 'debtor' . . . . Moreover, it seems illogical to conclude that Congress intended to limit § 362(h) to debtors when one of the principal purposes behind the automatic stay is to protect creditors from unequal treatment." Id. at 655; see also In re Prairie Trunk Rv., 112 B.R. 924, 930 (Bankr. N.D. Ill. 1990).

Pointer, however, seeks a different form of relief from that authorized by § 362(h). Rather than seeking damages, Pointer seeks instead to invalidate the Taxing Units' post-petition liens as violative of the stay. The Code specifically addresses standing to enforce this type of alleged stay violation -- unauthorized post-petition trans-

fers of property -- in § 549.[5] That section reads, in pertinent part, as follows:

> (a) Except as provided in subsection (b) or (c) of this title, the trustee may avoid a transfer of property of the estate --
> (1) that occurs after the commencement of the case; and . . .
> (2)(B) that is not authorized under this title or by the court.

11 U.S.C. § 549.[6] Attachment of a lien on property of the estate is clearly a "transfer" of property. 11 U.S.C. § 101(50) ("'transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an security interest and foreclosure of the debtor's equity of redemption").[7]

The gravamen of Pointer's complaint is that the attachment of ad valorem taxes liens under Texas law for 1987 and 1988 constituted a transfer of VVAL estate property which occurred after commence-

ment of the VVAL case and without authorization under the Bankruptcy Code or by the VVAL bankruptcy court. As such, Pointer is faced with the fact that § 549 is an avoidance power belonging solely to the trustee8 *or debtor-in-possession.*9 In general, as well as under § 549, only trustees and debtor-in-possession, not creditors, have standing to invoke avoidance powers. In In re Ciavarella, 28 B.R. 823, 825 (Bankr. S.D.N.Y. 1983), the bankruptcy court, in the context of a chapter 13 case, noted that the plain language of the Code mandates that only a trustee, not a creditor, is authorized to exercise the avoidance powers of §§ 547(b) and 549(a). The Court reasoned that "[i]f creditors . . . who received a preferential or avoidable transfers were answerable to the other creditors in the case, so that . . . creditors might shoot it out against each other while the . . . debtor stood by passively without having a choice in the matter, the net result would be the demise of the . . . case." Id.; see Nebraska State Bank v. Jones,

846 F. 2d 477, 478 (8th Cir. 1988) (single creditor cannot bring action to avoid fraudulent conveyance); Delgado Oil Co, Inc. v. Torres, 785 F.2d 857, 860 (10th Cir. 1986) (only a trustee can maintain post-bankruptcy action to avoid preference); In re Bacher 47 B.R. Bankr. 825, 829 (Bankr. E.D. Pa. 1985) (only trustee has standing to utilize § 548, not creditor); In re Van Brock, 33 B.R. 546 (Bankr. S.D. Fla. 1983) (cause of action under § 548 can only be asserted by trustee or debtor-in-possession, not creditor); see also In re MortgageAmerica Corp., 714 F.2d 1266, 1275-76 (5th Cir. 1983) ("A trustee acting under section 544 acts as a representative of creditors, and any property recovered is returned to the estate for the eventual benefit of all creditors. . . . Actions for the recovery of the debtor's property by individual creditors under state fraudulent conveyance laws would interfere with th[e] estate and with the equitable distribution scheme . . ."") (citations omitted). We agree with the reasoning of In re Ciavarella, and

find that the plain language of § 549 restricts its use to trustees or debtors-in-possession. With regard to the VVAL estate, Pointer is neither, and therefore lacks standing to bring this action insofar as it seeks to avoid the 1987 and 1988 ad valorem tax liens.

If, despite the absence of any apparent statutory authorization, we were to hold that Pointer could bring an action to avoid the Taxing Units' liens, we would be presented with a further anomaly. Section 549(d) provides a two-year limitations period for the avoidance by the trustee or the debtor-in-possession of a transfer under subsection (a). According to section (d),

> (d) An action or proceeding under this section may not be commenced after the earlier of --
> (1) two years after the date of the transfer sought to be avoided; or
> (2) the time the case is closed or dismissed.

11 U.S.C. § 549(d). This provision establishes a

time-frame in which the trustee must act if he is to utilize § 549(a. It would make little sense to impose a deadline on the trustee to avoid a transfer, but nevertheless to permit a creditor to exercise the avoidance power without such a limitation. In this very case, a question exists whether Pointer's complaint, had it been filed by the trustee, would have been timely.

Our conclusion does not mean that a creditor whose lien on property of the debtor is clearly diminished by the attachment of a statutory lien has no recourse. A creditor may bring an avoidance action under § 549, but only after moving the bankruptcy court for authorization to act on behalf of the trustee or debtor-in-possession. As explained in In re Savino, Oil & Heating Co.,

> [a]a a rule, individual creditors . . . lack the authority to institute avoidance actions. As indicated, such actions must be instituted by a trustee, debtor-in-possession or, with court approval, by a creditors' committee upon demonstrating that the trustee or debtor-in-possession unjustifiably declines to sue. This is not to suggest that a bankruptcy court can

> never authorize an avoidance action on behalf of the estate by an individual creditor in a Chapter 11 case, Fair and orderly bankruptcy administration, however, would dictate that such authority might be granted upon showings of particularly extraordinary circumstances.

91 B.R. 655, 656-57 (Bankr. E.D.N.Y. 1988); see In re Munoz, 111 B.R. 928, 931 (D. Colo. 1990) (for a creditor to assert an avoidance power, "courts have found it imperative that the creditor first seek approval from the bankruptcy court"); In re Curry & Sorenson, Inc., 57 B.R. 824, 828 (9th Cir. BAP 1986) (creditors lacked standing to bring avoidance action without prior court approval); In re Toledo Equip., 35 B.R. 315, 320 (Bankr. N.D. Ohio 1983) (creditors committee must first make appropriate showing that debtor-in-possession has unjustifiably failed to prosecute preference action before commencing action itself); see also In re Chernicky Coal Co., Inc., 67 B.R. 828, 832 (Bankr. W.D. Pa. 1986) (holding that creditor who did not seek authorization from bankruptcy court could neverthe-

less assert claim under § 549 in chapter 11 case because appropriate circumstances were shown -- i.e., there was no trustee to file the claim, the debtor had no reason to file a claim, and the successful avoidance of the transfer would have increased the debtor's liability). We therefore would have increased the debtor's liability). We therefore do not foreclose the possibility that a creditor, such as Pointer, may maintain an action on behalf of the trustee or debtor-in-possession to avoid a postpetition lien after seeking authorization from the court and a showing of appropriate circumstances.

In the instant case, however, Pointer has not sought authorization from the VVAL bankruptcy court to act on behalf of the VVAL trustee to avoid the tax liens and has shown no appropriate circumstances for so acting. Accordingly, we hold that she does not have statutory standing to bring suit to avoid the post-petition liens.

III. ENTITLEMENT TO PENALTIES, FEES AND COSTS

Pointer's complaint also alleged that the Taxing Units' 1985 and 1986 liens did not secure payment of post-petition penalties, fees, or costs. Pointer does not seek to avoid the tax liens for those years. Pointer may certainly seek court determination of the extent of the 1985 and 1986 liens on property of her estate.

The bankruptcy court found that the 1985 and 1986 liens did not secure the payment of penalties, fees, and costs, and the district court affirmed. On appeal, the Taxing units contend that they are entitled to penalties, fees, and costs that accrued post-petition on the unpaid 1985 and 1986 ad valorem taxes as part of their secured claim. To determine this issue, we look first to § 506(b) of the Bankruptcy Code, which states, in pertinent part, as follows:

> To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11. U.S.C. § 506(b) (emphasis added). Interpreting this provision, the Supreme court noted in United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S. Ct. 1026, 1030 (1989), that a creditor can only recover fees, costs, or other charges if they are reasonable and arise under an agreement with the debtor. "[I]n the absence of an agreement, post-petition interest is the only added recovery available." Id., 109 S. Ct. at 1030. In the instant case, there was no agreement between the parties for the recovery of fees, costs, or other charges.

The Taxing units argue that § 506(b) concerns the award of penalties, fees, and costs under a typical security agreement, and not, as is the case here, under a statutory lien. They also contend that the language in Ron Pair regarding the recovery of fees and costs is mere dicta.*10*

We find these contentions meritless. As the district court correctly noted, the plain language

of § 506(b) distingushes between voluntary secured claims (i.e., security agreements) and involuntary secured claims (i.e., statutory liens). All creditors can recover interest on an oversecured claim, but only creditors who have involuntary secured claims can recover penalties, fees, and costs. Moreover, while the Supreme Court's language in Ron Pair may bedicta, it has been adopted by several courts at law. In In re Parr Meadows Racing Ass'n, Inc., the Second Circuit noted the following:

> Ron Pair also answers the question whether, under § 506(b), the county is entitled to priority on its penalty claims. Under the bankruptcy code, "[r]ecovery of fees, costs, and charges" is allowed "only if the are reasonable and provieded for in the agreement under which the claims arose." In the absence of such an agreement, fees and costs are not recoverable . . . Here, the claims for penalties arose, not under an agreement between the parties, but by operation of law under the act.

880 F.2d 1540, 1549 (2d Cir. 1989) (citing Ron Pair, 109 S. Ct. at 1030), cert. denied, 110 S. Ct. 869

(1990); see also In re California Wholesale Elec. Co., 121 B.R. 360, 367 (Bankr. C.D. Cal. 1990) ("here, the State's claim for penalties . . . arose not under an agreement between the parties, but by operation of law under the tax act. Consequently, the State is not entitled to recover penalties as part of its secured claim.") (citing Ron Pair). We agree with the Second Circuit's interpretation of Ron Pair). We agree with the Second Circuit's interpretation of Ron Pair, and hold that the Taxing units are not entitled to post-petition penalties, fees, and costs for the unpaid 1985 and 1986 ad valorem taxes as part of their secured claim.

III. CONCLUSION

We find that Pointer lacked standing under the Bankruptcy Code to avoid the Taxing Units' 1987 and 1988 ad valorem tax liens. We therefore reverse the judgment below insofar as it held that the 1987 and 1988 liens violated § 362, and we remand with instructions to dismiss the portion of

Pointer's complaint seeking to avoid those liens. We affirm the judgment of the district court that the Taxing Units are not entitled to post-petition penalties, fees, or costs as part of their secured claim for the unpaid 1985 and 1986 taxes. The judgment of the district court is therefore AFFIRMED in part and REVERSED and REMANDED in part. Each party shall bear its own costs.

1. Texas ad valorem property tax liens attach each year pursuant to Tex. Tax Code Ann. § 32.01 et seq. (Vernon 1982 & Supp. 1991).

2. The Circuit courts that have thus far addressed the issue have not cited 28 U.S.C. §§ 959 and 960 or made any attempt to harmonize those statutes with §§ 362, 364 and 546 of the Bankruptcy Code.

3. Specifically, Pointer's complaint sought the following relief:

1. That the bankruptcy court set the extent, validity, and property of the Taxing Units liens against the Valwood Village Apartments.
2. That the Taxing Units be found to have no liens on the property for 1987 and 1988 ad valorem taxes;
3. That the exact amount of the base taxes for the years that are secured by a lien against the property be fixed at sums specified in exhibits to the

complaint.

4. That no lien be valid against the property to secure any penalty or fees, and that any lien secure only the payment of base taxes with simple interest thereon.

4. Creditors are clearly intended to benefit from § 362. The legislative history of subparagraph (a)(1) states, in pertinent part:

> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to an to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H.R. Rep. No. 595, 95th Cong. 1st Sess. 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5835; 1978 U.S.C.A.N. 5787, 6297.

5. Several authorities suggest that only the trustee or debtor-in-possession can seek the avoidance of transfers of property that violate the stay. See In re Brooks, 79 B.R. 479, 481 (9th Cir. BAP 1987) ("[I]f the debtor or the trustee chooses not to invoke the protections of § 362, no other party may attack any acts in violation of the automatic stay."), aff'd, 871 F.2d 89 (9th Cir. 1989); In re Stivers, 31 B.R. 735, 735 Bankr. N.D. Cal 1983) ("[T]he automatic stay operates in favor of debtors and estates (represented by trustees and debtors-in-possession) only and . . . it gives junior lienholders and other parties interested in the property affected by the automatic stay no substantive or procedural rights."); Martin J. Bienenstock, Bankruptcy Reorganization 131-32 (1987) ("In

chapter 11 cases, the sole entities with standing to seek redress for an automatic stay violation are debtors-in-possession or trustees"). But see In re Reserves Dev. Corp., 78 B.R. 951 (W.D. Mo. 1986), rev'd on other grounds, 821 F.2d 520 (8th Cir. 1987).

6. The legislative history of § 549 is instructive "[Section 549] modifies section 70d of current law. It permits the trustee to avoid transfers of property that occur after the commencement of the case. The transaction must eight have been unauthorized, or authorized under a section that protects only the transferor." H. Rep. No. 595, 95th Cong., 1st Sess. 375 (1977); S. Rep. No. 989, 95th Cong. 2d Sess. 90 (1978). As one treatise notes, "[t]he apparent intent of [§ 70d of the Bankruptcy Act of 1938] was to invalidate all transfers not granted specific protection under the statute, and thus set definite limits beyond which the courts could not go in protecting post-petition transactions."

4 Collier on Bankruptcy ¶ 549.03[1] (1991). One major change from § 70d of the Act of 1938 is that, under § 549, the right of the trustee to avoid and recover the transfers does not depend on whether the transfer was authorized. See Patrick A. Murphy, Creditor's Rights in Bankruptcy § 14.08 (2d ed. 1991).

7. As noted in In re Timberline Prop. Dev., Inc., 115 B.R. 787, 791 (Bankr. D.N.J. 1990), "a lien cannot be imposed on property of the estate without court approval. . . . The bankruptcy court, under 11 U.S.C. § 549(a), must approve a post-petition transfer of property of the estate. Since attachment of a lien is such a transfer of a lien is such a transfer, it is subject to court approval. 11 U.S.C. § 101(50." See also In re Electric City, Inc., 43 B.R. 336, 342-43 (Bankr. W.D. Wash. 1984) ("[T]he assertion of a lien as a post-bankruptcy transfer . . . would be subject to invalidation under § 549 despite the 'passive' creation of the lien.")

8. This court has noted that a transfer of property made in violation of the stay constitutes an unauthorized post-petition transfer which may be avoided by the trustee under § 549. In re Missionary Baptist Foundation of Am., Inc., 796 F.2d 752, 764 (5th Cir. 1986) (transfer of warrants for medicaid and medicare reimbursement payments from debtor to bank violated automatic stay, and trustee was entitled to invalidate transfer pursuant to § 549); see also In re Brooks, 79 B.R. 479, 480 (9th Cir. BAP 1987), aff'd 871 F.2d 89 (9th Cir. 1989).

9. 11 U.S.C. § 1107(a) gives a debtor-in-possession all rights of a trustee under Chapter 11.

10. The Supreme Court in Ron Pair had before it the narrow issue of whether § 506(b) of the Bankruptcy Code allows a creditor to receive post-petition interest on a nonconsensual oversecured claim allowed in a bankruptcy proceeding. The Court concluded that it does so allow. 109 S. Ct. at 1030.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-7072

IN THE MATTER OF: MARTHA JO POINTER,
Debtor.

CITY OF FARMERS BRANCH and
CARROLLTON-FARMERS BRANCH
INDEPENDENT SCHOOL DISTRICT,

Appellants,

v.

MARTHA JO POINTER,

Appellee.

Appeal from the United States District Court
for Northern District of Texas

ON PETITION FOR REHEARING
(February 11, 1992)

Before KING, JOHNSON and EMILIO M. GARZA, Circuit judges, King, Circuit Judge.

PER CUIRIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

CAROLYN DINEEN KING, U.S. CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CITY OF FARMERS BRANCH, ET AL.,	§	
	§	
Appellants,	§	
vs.	§	CA3-90-1324-R
	§	
MARTHA JO POINTER,	§	
	§	
Appellee.	§	

MEMORANDUM OPINION
(entered on docket November 15, 1991)

The City of Farmers Branch and the Carrollton-Farmers Branch School District (CFBISD) (collectively, the Taxing Units) appeal the judgment of the United States Bankruptcy Court. The bankruptcy court held that Taxing Units' lien for taxes for the years 1987 and 1988 did not attach to real property (the Property) Defendant took from the bankruptcy estate of Valwood Village Apartments, Ltd. (VVAL). Appellants raise two issues on appeal. First, whether the Bankruptcy Court properly

found that the Taxing Units are not entitled to penalties, fees, costs, or other charges on the portions of all unpaid ad valorem taxes that the Court determined were secured by valid liens. As both issues presented involve legal matters, this Court reviews the Bankruptcy Court's decision de novo. However, after de novo review, and for the reasons that follow, this Court AFFIRMS the judgment of the Bankruptcy Court.

FACTS

From 1963 through 1969, Gerald Pointer built an apartment complex in Farmers Branch, Texas. The complex was named Valwood Village Apartments (Valwood Apartments). In or about 1977, Gerald Pointer sold the Valwood Apartments. As partial consideration for the sale, Gerald Pointer accepted a promissory note secured by a deed of

trust granting Gerald Pointer a lien on the Valwood Apartments.

In 1982 Gerald Pointer and his wife, Martha Pointer, were divorced. As part of the Pointers' divorce decree, the divorce court awarded Martha Pointer the promissory note and deed of trust upon the Valwood Apartments. During the early 1980s the Valwood Apartments were transferred to various entities. All transfers of the Valwood Apartments were subject to the Pointers' lien. Martha Pointer (Pointer) had no interest in any of the entities to which the Valwood Apartments were transferred.

In 1986 VVAL owned the Valwood Apartments. On April 25, 1986, an involuntary petition under chapter 7 of title 11 was filed against VVAL. The VVAL case currently is pending as a chapter 7 case in the Northern District of Texas.

On November 16, 1987, Pointer filed for relief under chapter 11 of title 11 of the United States Bankruptcy Code. On February 2, 1988, Pointer, acting a debtor-in possession, filed a motion for relief from the stay in the VVAL bankruptcy case, seeking an order modifying the stay to allow Pointer to foreclose her lien upon the Apartments. On June 9, 1988, the bankruptcy court presiding over the VVAL bankruptcy case lifted the automatic stay, but only for the purpose of allowing Pointer to take any and all actions necessary to enforce her security interest in the Valwood Apartments. Pointer was the highest bidder at the foreclosure sale, and consequently, she purchased the Valwood Apartments via credit bid.

On January 10, 1990, Pointer filed her Complaint to Determine Extent, Validity, and Priority of Liens against

the City of Farmers Branch and CFISBD. On June 6, 1990, after argument upon stipulated facts, the Bankruptcy Court entered its corrected judgment, which ordered that the Taxing Units hold valid tax liens against Valwood Apartments to secure the ad valorem taxes and interest thereon for the years 1985 and 1986; that the Taxing Units' liens for such years do not secure penalties or other costs associated with or attributable to such taxes; and that the Taxing Units do not hold liens against the Valwood Apartments to secure ad valorem taxes for the years 1987 and 1988.

Pointer concedes that the Taxing Units have liens upon the Valwood Apartments to secure the payment of 1985 and 1986 base taxes and interest only, without penalties and fees. Consequently, the issue in this appeal involve whether Pointer should pay

penalties on the 1985 and 1986 taxes, and whether she should pay 1987 and 1988 taxes, penalties and interest.

ANALYSIS

I. The Taxing Units do not hold valid liens against the Property for unpaid 1987 for 1988 ad valorem taxes.

The Taxing Units contend that they hold valid lies again [sic] the Property for unpaid ad valorem taxes that became due in 1987 and 1988. According to the Taxing Units, the automatic stay imposed pursuant to 11 U.S.C. section 362(a)(4) (1979 & Supp. 1990) did not prohibit the creation of these statutory liens; furthermore, the exception to the automatic stay provisions, 11 U.S.C. sections 362 (b) (3) and 546 (b) (Supp. 1990), permit statutory liens for ad valorem taxes to attach to property that is property of a bankruptcy estate. In the alternative, The Taxing Units argue

that if the Bankruptcy Code did not permit the liens to attach the Property while the Property was in the VVAL bankruptcy estate, the moment the bankruptcy court in the VVAL case lifted the automatic stay and Pointer foreclosed on the Property, the lien attached.

A. The automatic stay provision, 11 U.S.C. section 362, prevented the creation of the Taxing Units' liens.

The Bankruptcy Code's automatic stay provision provides that, "except as provided in [11 U.S.C. 362(b)],"[1] a petition in bankruptcy "operates as a stay, applicable to all entities, of (4) any act to create, perfect, or enforce any lien against property of the estate."[2] Therefore, according to section 362(a)(4), not even governmental units[3] can create or perfect a lien against a debtor's property while

bankruptcy proceeding are pending against the debtor.[4] The automatic stay provision thereby ensures that all creditors receive an equitable share of the bankrupt's estate. Thus, section 362(a)(4) furthers the goal of the Bankruptcy Code by promoting equal treatment.[5]

In Texas, although taxes are not assessed or bills mailed out until later in the year, a tax lien attaches on January 1 of each year to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year.[6] In this case, then, the automatic stay provision did not prevent tax liens from attaching to the Property for taxes due in 1985 or 1986 because Valwood did not file its bankruptcy petition until April 1986, after the liens had attached for those years. However, because tax liens for

1987 and 1988 did not attach to the property until January 1 of 1987 and 1988, the automatic stay provision prevented those tax liens from creation and perfection. Therefore, the automatic stay of section 362(a)(4) barred any tax lien to secure the Taxing Units' claims for unpaid 1987 and 1988 ad valorem taxes from attaching to the property because the liens would have attached to the Property on January 1 of 1987 and 1988, after the date the involuntary petition was filed against VVAL.[7]

B. The exception to the automatic stay provision found in 11 U.S.C. section 362(b)(3) and 546(b) (Supp. 1990) does not exempt the tax liens in this case from the automatic stay imposed by 11 U.S.C. section 362(a)(4) (1979 & Supp. 1990).

The Taxing Units contend that an

exception to the automatic stay provision, found in sections 362(b)(3) and 546(b) of the Bankruptcy Code, applies in this case, thereby bypassing the automatic stay provision in 11 U.S.C. section 362(a)(4) and allowing the 1987 and 1988 tax liens to attach to the Property. Section 362(b)(3) of the Bankruptcy Code excepts from the automatic stay of section 362(a)(4) "any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b)."[8] Section 546(b) exempts from the trustee's avoiding power "any generally applicable law that permits the perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection."[9] Under 546(b), then, a creditor with an

interest in estate property that arose prepetition may acquire a perfected lien on that interest even if the perfection occurs postpetition.[10] Accordingly, if under Texas law, the Taxing Units had an interest in the Property that existed prepetition and if Texas law allows the Taxing Units' pre-existing interest to perfect and attach to the Property postpetition, the Taxing Units can collect from Pointer 1987 and 1988 ad valorem taxes on the Property.

Consequently, this Court must determine when the Taxing Units' interest in the Valwood Apartments arose. The Taxing Units, citing Maryland National Bank v. Mayor and City Council of Baltimore,[11] urge that they have an ever-present interest in the property and therefore, sections 362(b)(3) and 546(b) permit them to perfect their pre-existing interest

postpetition. Pointer, citing In re Parr Meadows,[12] contends that the Taxing Units' interest arises January 1 of each year, and so the Taxing Units cannot attach liens for the years beginning after the Property is in the bankrupts' estate. Ultimately, then, this Court must choose between the rationales these two cases set forth.

In Maryland National Bank, the Taxing Units' key precedent, the Fourth Circuit had to determine whether the City of Baltimore could assert its tax liens against the proceeds from property sold out of a bankrupt's estate.[13] Like this Court, the court in Maryland National Bank had to determine when taxing units' interest in property arose for the purposes of section 546(b).[14] Noting that the answer hinged on state law, the court found that the state's interest in property for tax purposes is

"ever-present."[15] Apparently, under the Fourth Circuit's reasoning, the state's interest dates back to the origin of the state and thus pre-exists any petition in bankruptcy.[16] Accordingly, the Maryland National Bank court held that the City was entitled to perfect its "ever-present" interest under section 546(b) as though the debtor's bankruptcy petition never had been filed.[17]

In re Parr Meadows,[18] the United States Court of Appeals for the Second Circuit had to determine whether sections 362(b)(3) and 546(a) permitted a local government's interest in obtaining payment of its property taxes to attach to estate property, in spite of the automatic stay provided in section 362(a)(4).[19] The Parr Meadows court recognized, as had the Maryland National Bank court, that the answer

hinges in part on state law. According to the court in Parr Meadows, under New York law " taxes computed from the assessment roll became 'due and payable on December first of each year,' at which point they 'become a lien' on the real property."[20] Although this New York statute states that taxes become a lien on real property on December 1 of each year, the Second Circuit stated that the county's interest in the property arose on "tax status day," some seven months before December 1 when the taxation process began.[21] The Parr Meadows court rejected the idea from Maryland National Bank that the state has an ever-present interest in the property. Because the court found that the county's interest in property arose in May every year, the county's tax liens did not fit into the exception to the automatic stay provision.

The Second Circuit based its decision on the purposes behind the automatic stay provision found in section 362(a)(4) and the purposes behind the exception found in sections 362(b)(3) and 562(a).[22] According to the Parr Meadows court, courts are to interpret statutory exceptions to the automatic stay narrowly and in accordance with the rationale underlying section 362(a)(4). As the automatic stay provision was designed to ensure that all creditors of a bankrupt estate, including local governments, receive fair and equal treatment, the court reasoned that the purpose of the provision effectively would be destroyed "if, for every year of the bankruptcy proceeding, the county were granted priority over all secured creditors and allowed to collect on its tax liens as they attach."[23]

Furthermore, according to the Parr Meadows court, section 546(b) never was intended to apply repeatedly doing a prolonged bankruptcy. Rather, Congress enacted section 546(b) to aid creditors who are surprised when a debtor files a bankruptcy petition by allowing creditors to perfect their security interest in the property if state law otherwise would permit it.[24] Thus, section 546(b) creates a one time exception. The Second Circuit stated, however, that the county was asking the court to create a "roving exception, which, every December 1, would add another lien at the front of the priority line, enabling the county to collect on all its claims as if no bankruptcy petition ever had been filed."[25] If the court were to grant such a rotating exception, the court stated that it would encourage a result

clearly contrary to Congress' intent.

This Court admits that section 32.01 of the Texas Property Tax Code differs from the provision in Parr Meadows because the Texas Tax Code provides for an automatic lien attaching on January 1 before the taxation process begins, but this Court finds the reasoning of the Second Circuit more persuasive than that of the Fourth Circuit. The Fourth Circuit based its conclusion that a taxing authority's interest in property is "ever-present" on a Maryland law that requires the proceeds of a forced sale of real property owned by a corporation to be applied first to all taxes due and payable at the time the proceeds are distributed.[26] The Fourth Circuit further reasoned that the state's right to compel

the first application of proceeds to taxes due and payable was a right that was perfected immediately whenever a competing interest arose. However, the court's inference that the taxing authority's "interest" dates back to the time when the states first assumed sovereign control of the land does not follow logically from the premise that Maryland can require the application of forced sale proceeds to taxes then due and payable. Additionally, the Fourth Circuit's decision ignores the congressional intent behind sections 362(a)(4) and 546(b), while the Second Circuit's Parr Meadows decision discerns and adheres to it.

Furthermore, the Taxing Units support their "ever-present" interest

argument on Article VIII, section 15 of the Texas Constitution, which acknowledges a "special" lien for property taxes. But Article VIII, section 15 grants a special lien to secure only the "annual assessment" made on real property.[27] Consequently, this provision fails to reflect an eternal interest in property; rather, the provision indicates that the Taxing Units' interest in real property for purposes of a special tax lien arises annually each time an assessment is made. Accordingly, this Court finds that the Taxing Units do not have an "ever-present" interest in property, instead, their interest arises January 1 of every year. As their interest in the Property arose after VVAL's bankruptcy petition had been filed, sections 362(b)(3) and 546(b) do not exempt the Taxing Units' tax liens from the

automatic stay imposed by section 362(a)(4).

C. The tax liens did not attach to the Property when the VVAL bankruptcy court lifted the automatic stay and Pointer foreclosed on the property.

The Taxing Units argue that, if the 1987 and 1988 tax liens did not attach to the Property while the Property was in the VVAL bankruptcy estate, the moment that the bankruptcy court in the VVAL case lifted the stay and Pointer foreclosed on the Property, the liens attached. However, the bankruptcy court's order lifting the stay expressly stated that it only lifted the stay to allow Pointer to enforce her security interest. The order did not lift the stay to allow any other creditors, including the Taxing Units, to take action against the Property,

Consequently, the Taxing Units cannot use the bankruptcy court's order for their own benefit.

Additionally, the Taxing Units contend that after Pointer foreclosed on the Property, the 1987 and 1988 tax liens immediately attached. However, when Pointer foreclosed on the Property, it immediately became part of her bankruptcy estate and subject to the automatic stay in her case. Thus, the Property was continuously subject to an automatic stay during 1987 and 1988--first in the VVAL case, then in Pointer's case--and 1987 and 1988 tax liens could not have attached upon the foreclosure sale to Pointer.

II. Section 506(b) of the Bankruptcy Code, 11 U.S.C. § 506(b) (1979 & Supp. 1990), does not entitle the Taxing Units to penalties, fees, costs, or any other noninterest charges

on the 1985 and 1986 ad valorem taxes, which were secured by valid liens.

Section 506(b) of the United States Bankruptcy Code articulates the treatment of claims that oversecured creditors have against property in a bankruptcy estate. Specifically, section 506(b) allows a holder of an oversecured claim to recover, in addition to the prepetition amount of the claim, " interest on such a claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose."[28] The United States Supreme Court recently construed this language in United States v. Ron Pair Enterprises, Inc.[29] Although in Ron Pair the Supreme Court cautioned that it was deciding the "narrow statutory issue whether section 506(b)...entitles a creditor to receive postpetition interest on a nonconsensual

oversecured claim allowed in a bankruptcy proceeding,"[30] the Court's analysis is dispositive in this case.

According to the Ron Pair Court, two types of secured claims exist.[31] First, voluntary or consensual secured claims are those claims created by an agreement between the debtor and creditor. The Bankruptcy code refers to these voluntary or consensual secured claims as "security interests."[32] Second, involuntary secured claims, such as judicial or statutory liens, are fixed by operation of law and do not require the debtor's consent to attach.[33] The Court in Ron Pair felt that the plain language of section 506 (b) distinguished between voluntary secured claims and involuntary secured claims.[34] In short, all creditors can recover interest in any oversecured claim, but only creditors who have

voluntary or consensual claims--claims in which the creditor and debtor made an agreement[35] --can recover penalties, fees, or costs.[36]

Applying the logic of Ron Pair to this case, this Court finds that the Taxing Units hold involuntary secured claims because the claims arose pursuant to statute. Quite simply, the Taxing Units' claims do not arise out of any agreement between the Taxing Units and Pointer. Accordingly, the Taxing Units only can recover postpetition interest on the unpaid 1985 and 1986 ad valorem taxes.

CONCLUSION

For all the reasons set forth above, this court AFFIRMS the Bankruptcy Court's decision in all respects.

SIGNED THIS 8 DAY OF NOV., 1990.

JERRY BUCHMEYER

UNITED STATES DISTRICT JUDGE

1. See infra notes 8-27 and accompanying text (discussing exception to § 362(a)(4) provided in § 362(b)).

2. 11 U.S.C. § 362 (a)(4) (1979 & Supp. 1990).

3. See 11 U.S.C. § 101(14) (Supp. 1990) (defining "entities" as "governmental units").

4. In re Parr Meadows Racing Ass'n, Inc., 880 F.2d 1540, 1545 (2d Cir. 1989), cert. denied sub nom. Suffolk County Treasurer v. Barr, 110 S. Ct. 869 (1990).

5. Parr Meadows, 880 F.2d at 1545.

6. Tex. Tax Code Ann. § 32.01 (Vernon Supp. 1990). The process of real property taxation in Texas is set forth in the Texas Tax Code Ann. §§ 1.01-43.04 (Vernon 1982 & Supp. 1990) (Tax Code). The Tax Code applies to the City of Farmers Branch and CFBISD as taxing units. See id. §§ 1.02, 1.04 (stating that Tax Code applicable to taxing units and defining "taxing units").

Each county has an appraisal district, administered by a chief appraiser, who is responsible for appraising property in the county for each taxing unit that imposes ad valorem taxes on real property in the county. Id. § 6.01(a), (b). In Dallas County, the Dallas Central Appraisal District appraises property for the City of Farmers Branch and the CFBISD.

The first step in the ad valorem taxation process occurs on May 15 of each tax year--the tax year being the calendar year (Id. § 1.04(13) (Vernon 1982)), at which time the law requires the chief appraiser to prepare appraisal records listing all taxable property in the district and the appraised value of each unit of taxable property. Id. § 25.01(a). The law also requires the chief appraiser to submit, by May 15 or as soon thereafter as possible, the appraisal records to the appraisal review board for review and for the determination of

protests. Id. § 25.22(a) (Vernon Supp. 1990); see also id. §§41.01-.11, 41.41-.47 (Vernon 1982 & Supp. 1990) (review and protest process). The appraisal review board must review the appraisal records, determine timely protests, and submit a list of its approved changes in the appraisal records to the chief appraiser. Id. § 25.25.

After receiving the corrected appraisal records form the appraisal review board, the chief appraiser must submit, by July 25, to the assessor for each taxing unit the appraisal roll for that taxing unit--i.e., the portion of the appraisal records that lists the taxable property for the taxing unit. Id. § 26.01(a) (Vernon Supp. 1990); see also id. § 25.24 (Vernon 1982) (defining "appraisal roll"). The assessor for each taxing unit then determines the total appraised value of all property. Id. §26.04(a) (Vernon Supp. 1990). By August 1 or as soon thereafter as practicable, the assessor must submit the appraisal roll to each taxing

unit's governing body. Id. § 26.04(b). The appraisal roll shows the total appraised, assessed, and taxable values of all property. Id. By September 1 or as soon thereafter as practicable, the governing body of each taxing unit adopts a tax rate for the current tax year (Id. § 26.05(a)), and the assessor calculates the tax imposed on each property designated on the appraisal roll. Id. § 26.09(e) (Vernon 1982). By October 1, the assessor must prepare and mail a tax bill to the owner of the property identified in the tax roll. Id. § 31.01(a).

Significantly, although real property owners do not receive their tax bill until sometime in October, a tax lien to secure property on January 1. Id. § 32.01 (Vernon Supp. 1990).

7. The Taxing Units contend that, because under Texas Tax law the tax liens attach automatically on January 1, no "acts" are necessary for perfection and attachment, and 11

U.S.C. § 362(a)(4) consequently does not apply. See 11 U.S.C. § 362(a)(4) (1979 & Supp. 1990) (automatic stay of "any act" to create, perfect, or enforce any lien). However, the property taxation process in Texas consists of several steps, including appraisal, protests, and assessment (see supra note 6 (describing Texas property taxation process)), all of which are involved in the process of creating and perfecting ad valorem tax liens and determining the amount of taxes that such liens secure. Cf. Parr Meadows, 880 F.2d at 1544-45 (listing acts that, under New York statutory taxation scheme, create and perfect tax liens). Furthermore, even if no affirmative "act" is necessary for the tax liens to perfect and attach, any liens that attach post-petition violate the automatic stay. Id. at 1545; see In re Guteri Special Steel Corp., 111 Bankr. 107, 110 (W.D. Pa. 1990) (listing, as actions taken against debtor's estate notices; school district confirmed and

adopted school tax rolls; and county adopted by resolution county taxes).

The Taxing Units further contend that, even if automatic imposition of the Taxing Units' liens is an "act" within the context of section 362(a)(4), the liens still are valid because acts taken in violation of 11 U.S.C. § 362 only are voidable subject to validation and not void from inception. The Taxing Units base their argument on Sikes v. Global Marine, Inc., 881 F.2d 176 (5th Cir. 1989). This Court finds that the Bankruptcy Court correctly stated that the Sikes decision neither validates the Taxing Units' liens for 1987 and 1988 nor affects the relief Pointer seeks.

8. 11 U.S.C. § 362(b)(3) (Supp. 1990).

9. 11 U.S.C. § 546(b) (Supp. 1990).

10. Equibank v. Wheeling-Pittsburgh Steel Corp., 884 F.2d 80, 85 (3d Cir. 1989).

11. 723 F.2d 1138 (4th Cir 1983).

12. 880 F.2d 1540 (2d Cir. 1989), cert. denied

sub nom. Suffolk County Treasurer v. Barr, 110 S. Ct. 869 (1990).

13. Maryland Nat'l Bank v. Mayor & City Council of Baltimore, 723 F.2d 1138, 1140 (4th Cir 1983).

14. Id. at 1141-42.

15. Id. at 1142.

16. Id. at 1144 n.14.

17. Id. at 1143-44.

18. 880 F.2d 1540 (2d Cir. 1989).

19. In re Parr Meadows, 880 F.2d 1540, 1546 (2d Cir. 1989),

20. Id. (quoting Suffolk County Tax Act § 13(b)).

21. Id.

22. Id. at 1547.

23. Id. (citing In re Guteri Special Steel Corp., 95 Bankr. 370 (Bankr. W.D. Pa. 1989).

24. Id. (citing H.R. Rep. No. 595, 95th Cong, 1st Sess. 371, reprinted in 1978 U.S. Code Cong. & Admin. News 6327).

25. Id.

26. Maryland National Bank, 723 F.2d at 1142.

27. Tex. Const. art. VIII, § 15.

28. 11 U.S.C. §506(b) (Supp. 1990); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 238-40 (1989).

29. 489 U.S. 235 (1989).

30. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 237 (1989).

31. Id. at 240.

32. 11 U.S.C. § 101(45) (Supp. 1990); Ron Pair, 489 U.S. at 240.

33. Ron Pair, 489 U.S. at 240.

34. Id. at 241.

35. See 11 U.S.C. § 506(b) (Supp. 1990) (permitting oversecured creditor to recover, in addition to interest, "any reasonable fees, costs, or charges provided for under the agreement under which the claim arose" (emphasis added)).

36. Ron Pair, 489 U.S. at 241.

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

IN RE:	§	
MARTHA JO POINTER	§	CASE NO. 387-36028-
Debtor	§	RCM-11

MARTHA JO POINTER	§	
Plaintiff	§	Adversary No.
vs.	§	390-3036
CITY OF FARMERS	§	[ENTERED ON
BRANCH, CARROLLTON-	§	APRIL 17, 1990]
FARMERS BRANCH I.S.D.	§	

MEMORANDUM OPINION

This case involves the extent, validity, and priority of the tax liens of claimants, City of Farmers Branch ("City") and Carrollton-Farmers Branch Independent School District ("ISD") (collectively, "Defendants" or "Taxing Units") against property of the

estate of Martha Jo Pointer ("Plaintiff" or "Pointer"), which property Plaintiff obtained by her foreclosure from the bankruptcy estate of Valwood Village Apartments, Ltd. ("VVAL"). Following are the Court's Findings of Fact and Conclusions of Law pursuant to Bankruptcy Rule 7052.

Procedural History

1. On January 10, 1990, Plaintiff filed her complaint to determine extent, validity, and priority of liens (the "Complaint") against Defendants.

2. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157(a) and 1334(b). This is a core proceeding under 28 U.S.C. § 157 (b)(2)(B) and (K). Defendants stipulated that the Court had jurisdiction and that this was a core proceeding. Both Taxing Units filed a claim in the Pointer bankruptcy case.

3. The Parties entered into an agreed order pursuant to which the parties agreed that

this proceeding would be determined upon the pleadings, stipulated facts, briefs, and oral arguments. The briefing and oral arguments have been completed.

Additional Stipulated Facts

The parties additionally stipulated to the following:

1. Plaintiff's confirmed modified third amended plan of reorganization as supplemented by the modification of September 15, 1988, provided that this Court retain jurisdiction to consider the within this adversary proceeding.

2. From 1963 to 1969, Gerald Pointer built, in sections, and apartment complex in Farmers Branch Texas ("Valwood Apartments"). In or about 1977, Gerald Pointer sold the Valwood Apartments. As part of the consideration for such sale, Gerald Pointer accepted a promissory note secured by a deed of trust granting Gerald Pointer a lien on the Valwood

Apartments.

3. In 1982, Gerald Pointer and his wife, Plaintiff herein, were divorced. As part of the divorce decree, Plaintiff was awarded the promissory not and deed of trust upon the Valwood Apartments. During the early 1980s the Valwood Apartments were transferred to various entities. All transfers of the Valwood Apartments were subject to Pointers' lien upon such apartments. Plaintiff did not have an interest in any such entity.

4. In 1986, the Valwood Apartments were owned by and entity named VVAL. On April 25, 1986, an involuntary petition under Chapter 7 of Title 11 was filed against VVAL (the "VVAL Petition Date"). VVAL's Chapter 7 bankruptcy case is still pending in the Northern District of Texas, Dallas, Division, before another Court, under, case Number 386-31339 HCA-7. Included in the estate of VVAL was the real and personal property of the

Valwood Apartments.

5. Pursuant to Texas Property Tax Code § 32.07, personal liability for the payment of ad valorem taxes upon real property in Texas fixes to the owner of Such real property on January 1 of such tax year. Pursuant to Texas Property Tax Code § 32.01, tax liens ordinarily attach to real property in Texas on January 1 of each year for the payment of such year's ad valorem taxes.

6. Pointer filed for relief under Chapter 11 of Title 11 of the United States Code on November 16, 1987.

7. On February 2, 1988, Pointer, acting as debtor-in possession, filed a motion for relief from the stay in the VVAL bankruptcy case, seeking an order modifying the stay to allow Pointer to foreclose her lien upon the Apartments. On June 9, 1988, the Honorable Harold C. Abramsom, the Bankruptcy Judge presiding over the VVAL bankruptcy case,

ordered that the automatic stay be lifted to allow Pointer to take any and all actions necessary to enforce her security interest in the Valwood Apartments.

8. On September 6, 1988, Pointer conducted a foreclosure sale of the Valwood Apartments. Pointer was the highest bidder at such sale, and, consequently, purchased the Valwood Apartments via credit bid.

9. Attached hereto are two schedules respectively entitled "Schedule B--City of Farmers Branch" and "Schedule C--Carrollton/Farmers Branch ISD". The schedules set out the amount of base taxes, penalties, interest and additional penalty for collection costs claimed by the Taxing Units as owing upon the Valwood Apartments for the tax years of 1988 and before, as of the following dates: (a) April 1986-the VVAL involuntary petition date; (b) September 1988 - Pointer's foreclosure date: and (c) March

1990 - the present. The parties stipulate that the amounts in the schedules are correctly stated;however, Pointer does not stipulate that all these amounts are secured by a lien upon the Valwood Apartments; Pointer merely stipulates that the Taxing Units have liens upon the Valwood Apartments to secure the payment of 1985 and 1986 base taxes and interest only, without penalties and fees. Whether liens upon the Valwood Apartments secure all other amounts is the subject of the dispute making up this adversary proceeding.

ISSUES

The precise issues involved in this case are:

1. whether the automatic stay provisions of § 362 bar the taxing Units from obtaining tax lien status for 1987 and 1988 taxes (the answer to this issue, in turn, depends on the extent to which the exceptions set forth in 11 U.S.C. §§ 362 (b) (3) and 546(b) are

applicable to these tax liens), and

2. whether the Taxing Units are entitled to penalties, fees , costs, or other charges on the portions of all unpaid ad valorem taxes that the Court determines to be secured by valid liens.

Debtor's contentions are pictorially set forth on Schedule A attached hereto. For a general discussion of the these type issue, see, Schwarz, et al, Treatment of Post Petition Real Estate Taxes in Bankruptcy, NORTON BANKRUPTCY LAW ADVISER (Monthly Analysis, March 1990).

Method of Real Property

Ad Valorem Taxation under Texas Law

Debtor substantially correctly sets forth the method of real property ad valorem taxation under Texas law. It appears that Method was utilized by the Taxing Units in the present case.

The process of real property taxation in

Texas is set forth in the Texas Property Tax Code Ann. §§ 1.01-43.04 (Vernon 1982 & Supp. 1990) (the "Tax Code"). The Tax Code applies to the City and the ISD as taxing units. Id., §§ 1.02, .04.

Each county has an appraisal district, administered by a chief appraiser, which is responsible of appraising property in the county for each taxing unit that imposes ad valorem taxes on real property in the county. Id., §§ 6.01(a)(b) and 6.05(c) (1982 & Supp. 1990). The Dallas Central Appraisal District appraises property in Dallas County for the City and the ISD.

A tax lien, to secure payment of all taxes imposed during a tax year on real property, attaches to the property on January 1 of each tax year (prior to the completion of the following steps described), regardless of when the taxes are actually imposed. Id., § 32.01 (Supp. 1990). § 32.01 reads as

follows:

> On January 1 of each year, a tax lien attaches to property to secure the payment of all taxes, penalties , and interest ultimately imposed for the year on that property, whether or not the taxes are imposed in the year the lien attaches. The lien exists in favor of each taxing unit having power to tax the property.

Amended by Acts 1983, 68th Leg., p. 4827, ch. 851, § 22, eff. aug, 1983.

[Emphasis Added].

The first step thereafter, in the ad valorem taxation process, occurs on May 15 of each tax year,[1] when the chief appraiser is required to prepare appraisal records that list all taxable property in the district, and state the appraised value of each such property. Id., § 25.01 (a). The appraisal records include the identity of each taxing

unit in which the property is taxable, a property description, and the appraised value of real property and improvements therein. Id., § 25.02(a)(2), (5), (6), and (11).

The chief appraiser is also required, by May 15 or as soon thereafter as practicable, to submit the appraisal records to the appraisal review board[2] for review and for the determination of protests. Id., § 25.22 (1982 & Supp. 1990); see also §§ 41.01-.11, 41.41-.47 (review and protest process) (1982 & Supp 1990). The appraisal review board must complete its review, determine timely protests, and submit a list of its approved changes in the appraisal records to the chief appraiser by July 20 of each tax year. Id., § 41.12 (Supp. 1990).

*after receiving the corrected appraisal records form the appraisal review board, the chief appraiser is required to submit to the assessor for each taxing unit the portion of

the appraisal records that lists the taxable property for such taxing unit. the part of the appraisal records that the chief appraiser certifies and submits to the assessor is the appraisal roll for that unit. Id., § 26.01(a) (Supp. 1990); see also Id., § 25.24 (1982).

After receiving the appraisal role, the assessor of each taxing unit determines that total appraised value, the total assessed value, and the total taxable value of all property. Id., § 26.04(a) (Supp. 1990). By August 1 of the tax year or as soon thereafter as practicable, the assessor must submit the appraisal roll to each taxing unit's governing body. The appraisal roll shows the total appraised, assessed, and taxable values of all values of all property. Id., § 26.04(b) (Supp. 1990).

By September 1 or as soon thereafter as practicable, the governing body of each

taxing unit then adopts a tax rate for the current tax year, Id., § 26.05 (a) (Supp. 1990), and the assessor calculates the tax imposed on each property designated on the appraisal roll. Id., § 26.09 (e) (1982).

By October 1 of the tax year, the assessor must prepare and mail a tax bill to the owner of the property identified in the tax roll. Id., § 31.01(a) (1982). The taxes may be paid without penalty on or before February 1 of the year following the year in which the tax was imposed. Id., § 31.02 (1982).

The Extent To Which
The Automatic Stay Presently Bars any Lien
Asserted By The Taxing Units for 1987 and 1988 Taxes

In In re Guteri Special Steel Corp., __B.R. __ (W.D Pa. 1990) (19900 WL 14264 (W.D. Pa. 1990) ("Guteri"), the District Court, in affirming the Bankruptcy Court

(opinion reported at 95 B.R. 370 (Bankr. W.D. Pa. 1989)O, held:

> The automatic stay ensures that no creditor receives more than an equitable share of the bankrupt's estate. This equitable treatment requires that all creditors, both public and private, be subject to the Automatic stay. In re Parr Meadows Racing Ass'n., Inc. ("Parr Meadows"), 880 F.2d 1540, 1545 (2d Cir.), cert. denied, 58 U.S.L.W. 3468 (1990). Congress used broad language to prohibit 'all entities', 11 U.S.C. § 362(a), including a 'governmental unit', 11 U.S.C. § 101 (14), from taking action against a debtor's property during bankruptcy proceedings. Parr Meadows, 880 F.2d at 1545.
>
> All actions taken in violation of the stay are void. In re Eisenberg, 7 B.R. 683, 686 (Bankr.E.D.N.Y.1980). See also In re Parr Meadows Racing Ass'n., Inc. ("In re Parr Meadows"), 92 B.R. 30, 32 (E.D.N.Y. 1988) (any tax lien claimed by county to attach after filing Chapter 11 petition void), aff'd in part, rev'd in part, 880 F.2d 1540 (2d Cir. 1989), cert,. Denied, 58 U.S.L.W. 3468 (1990).

The Taxing Units rely on Maryland National Bank v. Mayor and City Council of Baltimore, 723 F.2d 1138 (4th Cir. 1983) and its

interpretation under the specific Maryland tax statute of an "ever present" interest in the "State's property interest since a time well before..." the interest of the creditor. Id., at 1142.

With respect to the Texas ad valorem statutes, this Court finds more persuasive the reasoning of In re Parr Meadows Racing Ass'n., Inc. ("Parr Meadows"), 880 F.2d 1540 (2d Cir. 1989), cert. denied 110 S.Ct. 869, even though the New York statute involved in such case appears to somewhat reverse the procedures of the Texas statute. Also See, Equibank N.A. v. Wheeling-Pittsburg Steel Corp., 884 F.2d 80 (3rd Cir. 1989) ("Equibank") and In re Isley, 104 B.R. 673 (Bankr. D. N.J. 1989).[3]

The extent of the Texas tax liens did not come into effect passively; the extent thereof comes into effect as a result of the County's taxation process which consists of

several affirmative acts.

This Court agrees with the Parr Meadows court that § 546(b) was designed to provide a one-time exception for a creditor who acquires rights in the property, but had not yet perfected a lien before the petition was filed. Pointer concedes this one-time exception for the Taxing Units by conceding the validity of the Taxing Units' principal and interest claim for 1986 taxes. The automatic stay in the VVAL bankruptcy prevented the 1987 and 1988 tax liens from coming into effect. The Texas Property Tax Code provides that the tax liens attach automatically to the property on January 1 of each year to secure such year's ad valorem taxes "ultimately imposed". Id. § 32.01. The extent thereof is determined thereafter in accordance with the foregoing procedures. Sections 362(b)(3) and 546(b) do not permit the post petition perfection on such interest

for the 1987 and 1988 taxes by the Taxing Units would violate the stay in the VVAL bankruptcy and is accordingly void unless the stay was lifted. Equibank, supra; Parr Meadows, supra; Guteri, supra; In re Bellman Farms, Inc., 86 B.R. 1016 (Bankr. D. S.D. 1988); Isley, supra.

The federal Bankruptcy Code provides that the filing of a bankruptcy petition automatically stays the attachment of liens against property of the debtor. 11 U.S.C. § 362(a)(4). Since the two statutes are inconsistent and application of the state statute would frustrate the purpose of the federal statute, application of the state statute to permit validation of the 1987 tax liens is invalid. Perez v. Campbell, 402 U.S. 637, 91 S.Ct. 1704 (1971); Maryland v. Louisiana, 451 U.S. 725, 747 (1981).

Did The Tax Liens Become Valid Upon The Lifting Of The Stay By Pointer In The

VVAL Bankruptcy Or The Foreclosure By Pointer

The order lifting the stay in the VVAL case was specific and only lifted the stay as to Pointer, and not as to the Taxing Units.

Citing In re Bellman, supra and Matter of Reserves Development Corp., 821 F.2d 520 (8th Cir. 1987) ("Reserves Development"), the Taxing Units further and alternatively argue that after Pointer foreclosed on the property, the tax liens for 1987 and 1988 immediately attached pursuant to § 362(c)(1). Section 362(c)(1) reads as follows:

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;...

However, in this case, upon foreclosure, the property immediately became property of Pointer's bankruptcy estate and subject to the automatic stay in her case. Thus upon foreclosure, the lien for the 1988 taxes

never attached.[4] No lien attached pursuant to § 32.01 of the Texas Tax Code on January 1, 1988 because of the stay in the VVAL bankruptcy. Although the VVAL stay ended pursuant to § 362(c)(1) on September 6, 1988 (the date of the foreclosure by Pointer), no lien attached then because the stay in the Pointer bankruptcy was then in effect. In short, a lien could not attach for the 1988 taxes without violating § 362(a)(4).[5]

Lastly, the Taxing Units cite Sikes v. Global Marine, Inc., 881 F.2d 176 (5th Cir. 1989) ("Sikes") for the proposition that the Fifth Circuit has held that acts taken in violation of the automatic stay are voidable and not void; however, an order terminating the stay would be only effective from the date of entry (Id. at 179) in the absence of retroactive annulment. See, Sikes, at 180 (Johnson, J., dissenting on other grounds) (once actions determined to violate automatic

stay, it is "otherwise void" unless the Bankruptcy Court validates it at the behest of the violating party). Accordingly, the Sikes decision of the Fifth Circuit neither validates the Taxing Units' liens for 1987 and 1988 nor affects the relief sought by Pointer.

Under our present trial record, there had been no termination of the VVAL stay prior to the foreclosure by Pointer, and the present attempted affixation of the 1987 and 1988 tax liens post-foreclosure is "otherwise void" since the Pointer stay immediately became effective upon foreclosure by Pointer.

It this Court were to retroactively annul the Pointer stay to the date of foreclosure by Pointer, i.e. September 6, 1988, then, under § 362(c)(1), Bellman Farms, supra at 1020 and Reserves Development, supra, the 1987 and 1988 tax liens would immediately attach to the property.

Retroactive annulment of the stay is to be exercised sparingly and in "appropriate limited circumstances". In re Albany Partners, Ltd., 749 F.2d 670, 675 (11th Cir. 1984); Scrima v. John Devries Agency, Inc., 103 B.R. 128 (Bankr. W.D. Mich. 1989).

Neither of the Defendants pled specifically affirmatively for retroactive annulment of the stay in this adversary proceeding or otherwise in the main Pointer case. It is recognized that this is an evolving area of the interpretation of the law with respect to the interplay of ad valorem taxes, and §§ 362(a)(4), (b)(3), and 546(b); however, standing alone, and under the circumstances of this case, such evolution is insufficient justification for retroactive annulment of the stay to the date of foreclosure by Pointer. Any other claim for retroactive annulment of the stay in the VVAL bankruptcy would have to have been

addressed to the VVAL Bankruptcy Court.

The Taxing Units Are Not

Entitled To Penalties, Fees, or Other Charges

11 U.S.C. § 506(a) defines an allowed secured claim as follows:

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to set-off under §553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property....11 U.S.C. § 506(a).

11 U.S.C. § 506(b) entitles over-secured creditors to "reasonable fees, costs, or charges provided for under the agreement under which [the creditor's] claim arose." 11 U.S.C. § 506(b). The Taxing Units' claim for penalties and other noninterest fees arise by operation of law, not under an agreement, See, Tex. Tax Code Ann. § 33.01,

.07, .48 (Vernon 1982).

The Taxing Units admit that their liens are nonconsensual. To the extent the Taxing Units hold valid liens for unpaid ad valorem taxes, as heretofore stipulated by Plaintiff, such liens do not secure the payment of any penalties, fees, or costs attributable to such taxes. United States v. Ron Pair Enterprises, Inc., 109 S.Ct. 1026, 1030 (1989)("Ron Pair") ('[r]ecovery of fees, costs, and charges'[, however,] is allowed 'only if they are reasonable and provided for in the agreement under which the claim arose.') Parr Meadows, supra, at 1549 quoting Ron Pair, supra, at 1030. It is recognized that the Supreme Court, in Ron Pair, had before it a narrow issue, and therefore, its pronouncements therein on penalties, etc., were dicta. The court stated:

In this case we must decide the narrow

statutory issue whether § 506(b) of the Bankruptcy Code of 1978, 11 U.S.C. § 506(b) (1982 ed., Supp. IV), entitles a nonconsensual oversecured claim allowed in a bankruptcy proceeding. We conclude that it does, and we therefore reverse the judgment of the Court of Appeals.

Id. at 1028.

Judgement will be entered in accordance with the foregoing opinion.

The tax liens for principal and interest are valid for the 1986 taxes.

All issues raised or addressed in either parties' pleadings or briefs have been addressed in the foregoing opinion.

SIGNED: APRIL 13, 1990.

ROBERT C. McGUIRE

U. S. BANKRUPTCY JUDGE

1. The tax year is the calendar year . Id., § 1.04(13) (1982).

2. See Id., § 6.41 (1982 & Supp. 1990).

3. The Parr Meadows court, at 1548, discusses Maryland National Bank:

> Some no doubt will contend that our holding conflicts with the fourth circuit's determination in Maryland National Bank. While facially our analyses may differ, we think a full reading of the record in both cases shows our holdings to be reconcilable even if not congruent. First, both cases depend heavily on state tax law, which differs significantly between New York and Maryland. While the tax act in Maryland gave the fourth circuit significant indication that local government possessed a 'long standing' interest in the property, see 723 F.2d at 1142-43, the tax act at issue here makes absolutely no suggestion that the county's interest accrues any earlier than the tax status date. Second, stripped to its bare holding, Maryland National held only that a bankruptcy petition filed on October 31, 1979, only two months before the 'date of finality' under local tax law (presumably the date when the assessment roll becomes final), did not render invalid a tax lien perfected some six months later on July 1, 1980, because the local taxing entity had possessed an 'interest in [the] property' before the petition was filed. That is similar to our holding here: The bankruptcy petition, filed on June 12, 1979, nearly two weeks after the tax status date and more than two months before September 1 when the assessment roll becomes 'final', does not render

invalid a tax lien perfected months later on December 1, 1979, because the taxing entity possessed an 'interest in [the] property' before the petition was filed.

4. In view of holdings in this case, the Court does not need to decide the possible issue of whether the stay in Pointer's case, prior to her foreclosure, would have prevented imposition of a tax lien on the property. See, In re Cardinal Industries, Ind., 105 B.R. 834, 855 and In re Westec Corporation, 460 F.2d 1139 (5th Cir. 1972) holding that lien interests are property of the estate. The Cardinal Industries court, Id., at 855, distinguishes between lien and ownership interests, and it appears that an ad valorem tax lien is not a tax lien on a lien interest, but on an ownership interest.

5. One possible argument in favor of holding that a lien attached for the 1988 tax is that because there are two bankruptcies (VVAL's and Pointer's), there was a one-time § 546(b) exception for the 1986 taxes in the VVAL

bankruptcy and a one-time § 546(b) exception for the 1988 taxes in the Pointer bankruptcy. However, the problem with the argument is that § 546(b) does not apply to the (88 taxes to begin with. The key to § 546(b) is that there is applicable law that would permit such perfection of an interest. Under the facts of this case, the effect of the law in question (§32.01) was stayed by the VVAL bankruptcy, and thus there was no "applicable law". Accordingly, §546(b) cannot be applied to the 1988 taxes.

Supreme Court, U.S.
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(2)

No. 91-1824

In The

Supreme Court Of The United States

OCTOBER TERM, 1991

MARTHA JO POINTER,
Petitioner,
v.
CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT and the CITY OF FARMERS BRANCH
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT

LAW OFFICES OF EARL LUNA, P.C.
EARL LUNA
Counsel of Record
State Bar No. 12690000
Michael L. Atchley
State Bar No. 01397600
4411 N. Central Expressway
Dallas, Texas 75205
(214) 521-6001
(214) 521-1738 FAX
Attorneys for Respondent Carrollton-Farmers Branch Independent School District

QUESTIONS PRESENTED FOR REVIEW

1. Is bankruptcy court permission required before a creditor, such as Petitioner Martha Jo Pointer, has standing to assert that a post-petition claim for ad valorem tax liens of another creditor violates the automatic stay of 11 U.S.C. §362 and is therefore invalid?

2. Does a Chapter 11 "Debtor-in-Possession," such as Petitioner Martha Jo Pointer, have standing to bring an action to avoid the attachment of ad valorem tax liens arising during the course of another bankruptcy case, either in that case or in her own bankruptcy?

3. Does the automatic stay imposed by 11 U.S.C. §362 prevent post-petition "automatic perfection" of ad valorem tax liens against real property of the bankrupt estate?

LIST OF PARTIES

MARTHA JO POINTER:
Appellee below and Petitioner herein

CARROLLTON-FARMERS BRANCH
INDEPENDENT SCHOOL DISTRICT:
Appellant below and Respondent herein

CITY OF FARMERS BRANCH:
Appellant below and Respondent herein

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Matter of Pointer*, 952 F.2d 82 (5th Cir. 1992).

The Opinion of the United States District Court for the Northern District of Texas is not reported.

The Opinion of the United States Bankruptcy Court for the Northern District of Texas is reported as *In re Pointer*, 113 B.R. 285 (Bankr. N.D.Tex. 1990).

JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. §1254(1). The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 14, 1992. That court denied Martha Jo Pointer's Motion for Rehearing on February 11, 1992.

STATUTES

FEDERAL:

11 U.S.C. §362 (a) (4)

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a) (3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a) (3)), operates as a stay, applicable to all entities, of —

(4) any act to create, perfect, or enforce any lien against property of the estate.

11 U.S.C. §362(b) (3)

The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a) (3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a) (3)), does not operate as a stay —

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e) (2) (A) of this title.

11 U.S.C. §362(h)

An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

STATUTES — (Continued)

11 U.S.C. §505 (a) (1)

Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to a tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

11 U.S.C. §545(2)

The Trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien —

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C. §546(b)

The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection. If such law requires seizure of such property or commencement of an action to accomplish such perfection, and such property has not been seized or such action has not been commenced before the date of the filing of the petition, such interest in such property shall be perfected by notice within the time fixed by such law for such seizure or commencement.

STATUTES — (Continued)

11 U.S.C. §549 (a) (2) (B)

Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate —

(2) (B) that is not authorized under this title or by the court.

28 U.S.C. §960

Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

28 U.S.C. §2201 (a)

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an anti-dumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relation of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATUTES — (Continued)

STATE

TEX. CONST. art. VIII, §15

The annual assessment made upon landed property shall be a special lien thereon; and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of all the taxes and penalties due by such delinquent; and such property may be sold for the payment of the taxes and penalties due by such delinquent, under such regulations as the Legislature may provide.

TEX. TAX CODE ANN. §32.01

On January 1 of each year, a tax lien attaches to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on that property, whether or not the taxes are imposed in the year the lien attaches. The lien exists if favor of each taxing unit having power to tax the property.

TEX. TAX CODE ANN. §32.07

(a) Except as provided by Subsection (b) of this section, property taxes are the personal obligation of the person who owns or acquires the property on January 1 of the year for which the tax is imposed. A person is not relieved of the obligation because he no longer owns the property.

(b) The person in whose name a property is required to be listed by Section 25.13 or 25.15 of this code is personally liable for the taxes imposed on the property.

No. 91-1824

In The

Supreme Court Of The United States

OCTOBER TERM, 1991

MARTHA JO POINTER,

Petitioner,

v.

CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT AND THE CITY OF FARMERS BRANCH

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT (hereinafter referred to as "CFBISD"), Respondent herein, and files this, its BRIEF IN OPPOSITION, for which it would respectfully show the Court as follows:

STATEMENT OF THE CASE

A. Statement of Facts:

The facts in this case are, for the most part, stipulated. Gerald Pointer built an apartment complex, known as the "Valwood Village Apartments" (hereinafter referred to as

the "Property") in Farmers Branch, Texas. In or about 1977, he sold the apartments and accepted a promissory note secured by a deed of trust that granted him a lien on the Property. In 1982, Gerald and his wife, Martha Jo Pointer (hereinafter referred to as "Pointer"), were divorced. As part of the divorce decree, Martha Jo Pointer was awarded the promissory note and the deed of trust.

In 1986, the Property, after having changed hands several times, was owned by Valwood Village Apartments, Ltd. (hereinafter referred to as "VVAL"). VVAL took the Property subject to Pointer's lien. VVAL was forced into involuntary bankruptcy under Chapter 7 of the United States Bankruptcy Code on April 25, 1986. The bankruptcy case against VVAL is currently pending in the Northern District of Texas.

On November 16, 1987, Pointer filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. Later, on June 9, 1988, the bankruptcy court presiding over VVAL's estate granted Pointer's motion to lift the stay so as to allow her to foreclose her lien on the Property. Pointer was the low bidder at the ensuing foreclosure sale, and took the Property into her bankruptcy estate. Pointer's bankruptcy case also remains pending in the Northern District of Texas, and this case is an adversary proceeding within that bankruptcy case.

B. Course of Proceedings:

On or about January 10, 1990, Pointer filed her Complaint to Determine Extent, Validity and Priority of Liens (hereinafter referred to as the "Complaint") against CFBISD and the City of Farmers Branch (hereinafter referred to as the "City") (CFBISD and the City sometimes referred to collectively as the "Taxing Units") in the United

States Bankruptcy Court for the Northern District of Texas, Dallas Division. The bankruptcy court handed down a Memorandum Opinion on April 13, 1990, and the Corrected Judgment was entered on June 5, 1990. Among other things, that court held that the Taxing Units did not hold valid liens to secure payment of 1987 and 1988 ad valorem taxes on the Property and "to the extent any such liens attached to the Property by operation of law, they are hereby declared void, invalid, and of no effect." Corrected Judgment of Bankruptcy Court at 3. (R.164). That court also held that the Taxing Units did hold valid liens to secure ad valorem taxes for the years 1985 and 1986 but that those liens did not secure the payment of penalties or other costs associated with or attributable to the 1985 or 1986 ad valorem taxes.

The Taxing Units duly filed for appeal to the United States District Court for the Northern District of Texas, pursuant to 28 U.S.C. §158 (a) and Bankruptcy Rule 8001 (a), which confer appellate jurisdiction on a District Court from a final decision of a bankruptcy court. The District Court upheld the decision of the bankruptcy court via a Memorandum Opinion signed on November 8, 1990, filed on November 14, 1990, and entered on the Docket, pursuant to Fed. R. Civ. P. 58 and 79 (a), on November 15, 1990.

Thereafter, the Taxing Units duly filed for appeal to the United States Court of Appeals for the Fifth Circuit, pursuant to 28 U.S.C. §1291. On January 14, 1992, that Court affirmed the District Court's ruling with regard to the penalties and other costs associated with the 1985 and 1986 ad valorem taxes but reversed the District Court with regard to the validity of the liens securing payment of the 1987 and 1988 ad valorem taxes. The Fifth Circuit held that Pointer did not have the statutory standing necessary to

bring suit to avoid said liens. *Matter of Pointer*, 952 F.2d 82, 89 (5th Cir. 1992) (Petition, A-19). Pointer duly filed a Motion for Rehearing, which was denied by the Fifth Circuit on February 11, 1992.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Fifth Circuit held that Pointer does not have standing to avoid the attachment of the ad valorem tax liens which arose post-petition in the VVAL bankruptcy. Pointer argues that the court erred in so holding, and cites to various statutes under which she could ostensibly have standing in the VVAL bankruptcy case, as well as in her own bankruptcy case. Her arguments are, however, unpersuasive.

Pointer has failed to rebut the Fifth Circuit's requirement that she, as a creditor in the VVAL bankruptcy case, seek permission from that bankruptcy court before prosecuting an action to avoid the liens at issue. She has further failed to show how she could properly maintain standing in her own bankruptcy case so as to avoid the liens. She attempts to confuse the issues by asserting new and unfounded bases for standing and by claiming that the court had an ulterior motive in denying her standing, but these attempts cannot stand. Pointer simply failed to utilize the proper procedure for avoiding the liens. That is, she should have sought permission from the VVAL bankruptcy court to prosecute an avoidance action when the liens were a part of that bankruptcy estate. It is difficult to establish standing in one court to litigate issues rightfully reviewed in another.

Further, even if this Court were to reach the issue of the validity of the liens, it would find that the liens validly attached to the Property notwithstanding the VVAL stay. This is because no act is undertaken in order for the liens to

attach. Thus, the stay provision of the Bankruptcy Code is simply not violated thereby. Also, even if the liens were otherwise violative of the stay, they are valid in this case nevertheless, in that they secure a pre-petition interest.

Therefore, Pointer cannot adequately rebut the Fifth Circuit's holding in this case. Her Petition should be denied.

ARGUMENT AND AUTHORITIES
QUESTION NUMBER 1 (RESTATED)

> Is bankruptcy court permission required before a creditor, such as Petitioner Martha Jo Pointer, has standing to assert that a post-petition claim for ad valorem tax liens of another creditor violates the automatic stay of 11 U.S.C. §362 and is therefore invalid?

1.A. Pointer should have utilized the proper procedure in the bankruptcy court.

The arguments set forth under Question No. 1 in Pointer's Petition for Writ of Certiorari (hereinafter referred to as her "Petition") actually cover much more ground than the heading might imply. The question of whether bankruptcy court permission is required before a creditor in Pointer's position may properly challenge such transfers as the attachment of tax liens is addressed in subparts 1.D. and 1.E. of Pointer's Petition, pages 22-31.

Pointer argues that the United States Court of Appeals for the Fifth Circuit has developed a "ludicrous" requirement that a creditor in Pointer's position seek bankruptcy court approval before acting on behalf of the trustee or debtor-in-possession in a bankruptcy case. This argument focuses on that part of the Opinion of the Fifth Circuit, after it had concluded that Pointer lacks, at this point, the requisite statutory standing to avoid the liens in question, wherein the court states:

> Our conclusion does not mean that a creditor whose lien on property of the debtor is clearly diminished by the attachment of a statutory lien has no recourse. A creditor may bring an avoidance action under §549 [of the Bankruptcy Code], but only after moving the bankruptcy court for authorization to act on behalf of the trustee or debtor-in-possession.

Matter of Pointer, 952 F.2d at 88. (Petition, A-17). Through all of her attack on the Fifth Circuit's reasoning, Pointer never really explains why she did not seek relief in the VVAL bankruptcy case. At the time the liens in question arose, that is, January 1, 1987 and January 1, 1988, the Property was a part of the VVAL estate. Thus, Pointer was a creditor of that estate at that time, and the Property was subject to determinations of that bankruptcy court at that time. Pointer did nothing, and there is no evidence that the debtor-in-possession or trustee unjustifiably failed to prosecute an avoidance action. What the Fifth Circuit is telling Pointer, and similarly situated creditors, is that if a tax lien or some other exigency arises which will diminish the creditor's lien on property, she must act to avoid that situation and she must do so by means of the proper procedure.

To support this rule, the Fifth Circuit cites to several authorities, including *In re V. Savino Oil & Heating Co.*, 91 B.R. 655 (Bankr. E.D.N.Y. 1988). That case instructs that individual creditors, as a general rule, have no authority to institute avoidance actions. Upon a showing to the bankruptcy court of particularly extraordinary circumstances, however, it is not outside the powers of the bankruptcy court to authorize an avoidance action on behalf of a bankruptcy estate by an individual creditor thereof. *Id.* at 656-57. Pointer argues that such extraordinary circumstances exist here. The only circumstances refered to by Pointer, however, are those arising after the Property left

the VVAL estate, and Pointer ceased to be a creditor thereof. Thus, "extraordinary circumstances," as envisaged by the *Savino* court, do not exist here. Moreover, even if they arguably so existed, the Supreme Court of the United States is not the forum within which to raise such a contention. Pointer should have exhausted her remedies within the VVAL bankruptcy case and given the bankruptcy court with jurisdiction over that case the opportunity to decide the issues she now raises. That court would be in a far better position than any appellate court to make such a determination.

Pointer also attempts to distinguish *Savino* by stating that, in the case at bar, no one asserted any stay violation while the Property was in the VVAL estate, whereas such a violation was asserted in *Savino*. That fact does not distinguish *Savino* in any important aspect, but it does expose Pointer's primary problem herein. She should have taken some action while the Property was in the VVAL court to avoid the liens.

To support the holding that creditors such as Pointer must utilize the proper procedures to protect their interests, the Fifth Circuit also relies upon *In re Munoz* 111 B.R. 928 (Bankr. D.Colo 1990), in which it was held to be imperative that a creditor seek approval of the bankruptcy court before asserting an avoidance power, and *In re Toledo Equipment* 35 B.R. 315 (Bankr.N.D.Ohio 1983), in which it was held that a creditor must first make a showing that the debtor-in-possession has unjustifiably failed to prosecute a preference action before the creditor may so prosecute. The court also relies upon *In re Chernicky Coal Company, Inc.*, 67 B.R. 828 (Bankr. W.D.Pa, 1986), in which it was held that an individual creditor could assert a claim even though he had not sought bankruptcy court authorization, but could do so only under appropriate circumstances.

Pointer tries to distinguish *Toledo* by pointing out that the bankruptcy case at issue there was a chapter 11 case, while the VVAL bankruptcy was filed under chapter 7. That distinction is, of course, meaningless for our purposes and does not change the general rule as it applies here. Pointer attempts to rely on *Chernicky Coal* and claims that appropriate circumstances exist herein. As stated earlier, however, such circumstances did not exist when Pointer was a creditor of the VVAL estate and this Court is not the proper forum in which to litigate such a contention.

Pointer cites to *In re Louisiana World Exposition, Inc.*, 832 F.2d 1391 (5th Cir. 1987) to stand for the proposition that a creditor need not seek action by the debtor-in-possession before pursuing an action in bankruptcy court. This reliance is of little value in the present case. The *Louisiana World* court held that a creditors' committee had standing to pursue an action without first requesting the debtor-in-possession to act. That court stated that, as a general rule, 1) the claim of the creditors' committee must be colorable, 2) the debtor-in-possession must have refused unjustifiably to pursue the claim, and 3) the creditors' committee must receive leave to sue from the bankruptcy court. *Id.* at 1397. Pointer argues that since the *Louisiana World* court did not require the creditors' committee to seek action by the debtor-in-possession in that case, Pointer should likewise be allowed to proceed without the restraint of such a prerequisite. However, the rationale upon which that court based its waiver of certain prerequisites is distinguishable from the case at bar.

In *Louisiana World*, the creditors' committee had asked the debtor-in-possession to file suit with regard to issues closely related to those raised by the complaint of the committee. The debtor-in-possession refused to maintain the

requested action. *Id.*, 832 F.2d at 1397-98. Conversely, Pointer never requested anything in the VVAL bankruptcy case with regard to nullifying the tax liens at issue here. Whereas the *Louisiana World* court had some evidence upon which to base a finding that the debtor-in-possession would not have acted even if requested, this Court cannot know what might have happened in the VVAL bankruptcy case if Pointer had requested some action. Whereas the *Louisiana World* debtor had previously been requested to act and refused, no one in the VVAL bankruptcy was given the opportunity.

Further, the *Louisiana World* court had a reason for granting standing. As that court points out:

> . . . since we in any event hold adversely to the [creditors'] [c]ommittee on the merits, we find it . . . unnecessary to now go through the empty, formalistic ritual of remanding the case . . . and [then again have the committee] present its complaint, so that we may deny it on the merits.

Id., 832 F.2d at 1398. Thus, the *Louisiana World* court was predisposed to deny the committee's claim on the merits and found the formalistic standing requirements, which could be cured in that case via time consuming remands, to be in conflict with judicial economy. That case, therefore, presents a completely different set of circumstances than this case, and provides no comfort to Pointer, who never sought any action in the VVAL bankruptcy court.

Similarly, Pointer's reliance on *In re McKeesport Steel Castings Company*, 799 F.2d 91 (3d Cir. 1986), and *In re Parque Forestal, Inc.*, 949 F.2d 504 (1st Cir. 1991) are misplaced. *McKeesport Steel* is distinguishable in that the creditor therein was seeking to remedy non-action on the part of the debtor-in-possession. Not only had there been a request

for action, but a hearing on the failure of the debtor to act. Such a fact situation vastly differs from that presented in the present case. The same is true of *Parque Forestal*. As in *McKeesport Steel*, that case involved section 506(c) of the Bankruptcy Code. The creditors were the only ones who would zealously pursue the claim because their interests were at odds with the interests of the debtor-in-possession. *Parque Forestal*, 949 F.2d at 512. This same type of fact situation underlies the ruling in *Matter of Delta Towers, Ltd.*, 924 F.2d 74 (5th Cir. 1991), also cited by Pointer. Pointer, whose interests were not in direct conflict with the interest of the VVAL estate, cannot properly rely on these cases in order to claim that she need not seek action by that estate or approval of the VVAL bankruptcy court. VVAL had an interest in nullifying the tax liens at issue while the Property was a part of that bankruptcy estate. There is no evidence to show that action by the VVAL trustee would have been impossible or improbable had Pointer only requested.

1.B. Section 362(h) does not apply here.

Pointer argues that the Fifth Circuit was too quick to conclude that 11 U.S.C. §362(h), which provides for the recovery of actual damages by individuals injured by willful stay violations, does not grant her standing to bring this suit. As pointed out by the Fifth Circuit, however, Pointer has never sought the type of damages provided by section 362(h) and has not claimed to have been damaged by a willful stay violation. *See Matter of Pointer*, 952 F.2d at 86. (Petition, A-12). Pointer is here seeking to invalidate the tax liens at issue. This is not the stuff of which section 362(h) claims are made, and it would be improper to base standing on section 362(h) when Pointer is not seeking the relief provided thereby.

1.C. The Fifth Circuit properly examined Pointer's standing under 11 U.S.C. §549 (a).

As pointed out in the Opinion of the Fifth Circuit in this cause, attachment of a lien on property of the estate is clearly a "transfer" of property. *See Matter of Pointer*, 952 F.2d at 87 (Petition, A-13) and 11 U.S.C. §101(50). The assertion of a lien is a post-bankruptcy transfer, and is subject to possible invalidation, if at all, under section 549. *See Pointer*, 952 F.2d at 87, n.7 (Petition, A-29); *In re Electric City, Inc.*, 43 B.R. 336, 342-43 (Bankr.W.D. Wash. 1984).

Having resolved that lien attachment constitutes a transfer of property, the liens in question would constitute post-petition transfers since they arose after the filing of the VVAL petition. A post-petition transfer of property may be avoided by the trustee under §549. *Matter of Missionary Baptist Foundation of America, Inc.*, 796 F.2d 752, 764 (5th Cir. 1986); *In re Brooks*, 79 B.R. 479, 480 (9th Cir. BAP 1987), *aff'd*, 871 F.2d 89 (9th Cir. 1989).

Pointer argues that the Fifth Circuit back-handedly validated the liens via its ruling in this case. That is a mischaracterization of the court's function, however. It is the trustee's duty to move for the invalidation of post-petition transfers. *See, e.g., Missionary Baptist*, 796 F.2d at 764 (wherein the court states that the trustee *is entitled to invalidate* transfers that violate the stay). This rule comports to the general rule that actions taken in violation of the stay are voidable, not void. *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989); and that which is voidable operates to accomplish the thing sought until the fatal vice has been judicially declared. *See Slaughter v. Qualls*, 139 Tex. 340, 162 S.W.2d 671, 674 (1942).

Pointer further argues that the Fifth Circuit should have analyzed her standing under section 545 instead of section

549. Section 545 is addressed to the trustee, however, and Pointer fails to explain how the calculus would differ thereunder. She also does not explain why it is error to determine the power to avoid post-petition transfers under section 549. The fact is that Pointer, as an individual creditor, would not have standing under either section and the Fifth Circuit did not err in applying section 549 to Pointer's situation.

QUESTION NUMBER 2 (RESTATED)

> Does a Chapter 11 "Debtor-in Possession", such as Petitioner Martha Jo Pointer, have standing to bring an action to avoid the attachment of ad valorem tax liens arising during the course of another bankruptcy case, either in that case or in her own bankruptcy?

2.A. Pointer was not a "debtor-in-possession" when the liens attached.

Pointer argues that she has standing in her own bankruptcy case to challenge the validity of the liens at issue. In formulating her argument, however, she misconstrues the facts of this case and misapplies the law thereto. Pointer claims to have been a debtor-in-possession as of November 16, 1987, the date her petition-in-bankruptcy was filed. *See* Pointer's Petition at 33. While that may be true, she was not the debtor-in-possession of the Property at issue here. She did not take possession of the Property until on or after June 9, 1988, the date on which the VVAL bankruptcy court lifted the stay and allowed her to foreclose her lien on the Property. It was not until that time that the Property became a part of Pointer's estate and she a "debtor-in-possession" for our purposes.

The liens in question arose on January 1, 1987 and January 1, 1988, pursuant to TEX. TAX CODE ANN. §32.01 (Vernon Supp. 1992). On both of these dates, the Property

was subject to the VVAL bankruptcy. If these liens were able to be invalidated, it would be because of the stay imposed by the *VVAL bankruptcy* case. Pointer attempts to confuse the issues in her Petition, but the issue as to voidability was a question for the VVAL bankruptcy court to decide. Pointer's Complaint sought to avoid the liens based upon the automatic stay of section 362. The only stay in effect on the Property on January 1, 1987 and January 1, 1988 was that of the VVAL estate. The issue becomes then, whether Pointer, as a creditor in the VVAL case, may utilize the avoidance power necessary to invalidate the liens. The Fifth Circuit was correct in its analysis of this issue.

Pointer argues that the filing of her petition in November of 1987 operated as a stay against the tax lien arising January 1, 1988. Unfortunately, the Bankruptcy Code does not support her contention. She relies upon 11 U.S.C. §362 (a) (4), which states:

> (4) any act to create, perfect or enforce any lien against *property of the estate*.

11 U.S.C. §362 (a) (4) (emphasis added). As mentioned earlier, the Property at issue here did not become "property of the estate" in the Pointer bankruptcy case until after June 9, 1988. Therefore, as the plain language of section 362 (a) (4) reads, the Pointer bankruptcy petition did not operate as a stay against anything that happened with regard to the Property before that time. *See, e.g., In re Illinois-California Exp., Inc.*, 50 B.R. 232 (Bankr. D.Colo. 1985) (automatic stay provisions are inapplicable as far as they concern property which is not part of the estate and which does not belong to the debtor). The fact that the Property *later* became part of the Pointer bankruptcy estate has no bearing on the calculus. For property to pass into a bankruptcy estate, and then to be subject to the protection of the

automatic stay, the debtor must have had an interest in that property as of the commencement of the bankruptcy case. *In re Bigalk*, 75 B.R. 561 (Bankr. D.Minn. 1987). All of the relevant activity took place pre-petition vis-a-vis the Property's relationship to the Pointer bankruptcy estate. By the time the Property entered the Pointer estate, the liens had already attached and been perfected, subject only to invalidation in the VVAL bankruptcy case.

Pointer would argue that the liens were not merely subject to invalidation, but were void ab initio. As stated earlier, however, such a stance conflicts with the general rule regarding the section 362 stay. Even if the liens in question were violative of the stay, they would not be void. Acts taken in violation of the stay are voidable, not void. *Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989). This rule is bolstered by the fact that a lien which is ostensibly violative of section 362(a)(4) is able to be revived via section 546(b) and 362(b)(3). Further, liens which would otherwise be invalid may be pursued when the property leaves the estate. *See Matter of Reserves Development Corporation*, 821 F.2d 520 (8th Cir. 1987). If a lien were void from its inception, it could never be cured because it simply would be nugatory and of absolutely no effect. *See Sikes*, 881 F.2d at 178. At this point, then, the liens that arose during the VVAL bankruptcy are valid subject to possible invalidation. *See Slaughter v. Qualls*, 139 Tex. 340, 162 S.W.2d 671, 674 (1942). As the issues in this case involve the VVAL automatic stay and the time frame within which the Property was a part of the VVAL estate, the VVAL bankruptcy court would clearly be the proper forum in which to bring such an avoidance action.

2.B. 11 U.S.C. §505 does not aid Pointer.

Pointer further argues that she has standing, pursuant to 11 U.S.C. §505, to bring an avoidance action in her

bankruptcy case. She has heretofore never claimed to be bringing an action pursuant to section 505, and raises the issue for the first time on appeal. Nevertheless, section 505 does not apply to the facts of this case, and Pointer can find no comfort in the terms thereof. Her complaint sought to invalidate certain liens that arise under Texas law to secure the payment of ad valorem taxes. Section 505 states that a court:

> may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to a tax . . .

11 U.S.C. §505 (a) (1). The problem Pointer faces in relying on this provision, however, is that she is not seeking to determine the validity of a tax, fine, penalty or addition to a tax. She is, rather, seeking to determine the validity of liens. The liens are the security for the tax, not the tax. *See* TEX. TAX CODE ANN. §32.01 (Vernon Supp. 1992). A tax lien is merely a security established by statute of which the taxing authority may avail itself in the event of a default in payment. *United States v. Phillips*, 267 F.2d 374, 377 (5th Cir. 1959). The lien adds nothing to the tax, and does not give rise to the tax. The lien arises each January 1 regardless of whether any taxes are imposed in that year. TEX. TAX CODE ANN. §32.01 (Vernon Supp. 1992). The lien cannot be avoided merely because it arises before the amount of taxes due for a given year has been assessed. *See Stanford v. Butler*, 826 F.2d 353, 357 (5th Cir. 1987). Further, even if an action were brought which effectively extinguished a tax lien, the taxes themselves would not be invalidated. There would continue to be, at the very least, personal liability for the taxes. TEX. TAX CODE ANN. §32.07 (Vernon 1982). Therefore, even if Pointer did have standing under section 505, that provision does not apply to this case.

2.C. 28 U.S.C. §2201 does not grant standing to Pointer.

Pointer, for the first time on appeal, is also claiming to be bringing an action for declaratory judgment pursuant to 28 U.S.C. §2201. Here again, she is attempting to confuse the issues involved in this case.

Section 2201 cannot be utilized by Pointer if, as she claims, she is bringing this action pursuant to 11 U.S.C. §505. Her remedy, if any, would lie within section 505. Section 2202 creates an additional cause of action when a federal court already has jurisdiction,

> . . . except with respect to Federal taxes . . . *a proceeding under section 505 or 1146 of Title 11* . . .

28 U.S.C §2201 (emphasis added).

Further, Pointer argues that, since this is a declaratory judgment action, the standard of review the Fifth Circuit should have employed is the "abuse of discretion" standard. Interestingly, CFBISD properly reported in its brief to the Fifth Circuit that the review to be undertaken was de novo. (See Fifth Circuit Brief of CFBISD at 3). Pointer did not argue this point. Obviously, she was not bringing a declaratory judgment action.

She is now asserting a new theory upon which to base recovery. Unless it comes under an exception to the general rule, and this case does not, a party cannot properly raise a new theory on appeal that was not raised or passed upon by the lower court. *Capps v. Humble Oil and Refining Co.*, 536 F.2d 80, 82 (5th Cir. 1976). Also, this Court does not have original jurisdiction over a declaratory judgment action. *See* U.S. Const. Art. III, §2, c1.2. Therefore, Pointer cannot now bring this issue here.

Also, Pointer may not properly rely solely upon 28 U.S.C. §2201 as a basis for standing. Standing to sue is a

preliminary question to be considered by a court as a limitation to its jurisdiction. *American Postal Workers Union of Los Angeles, AFL-CIO v. United States Postal Service*, 861 F.2d 211, 213 (9th Cir. 1988). Standing is essential to the exercise of jurisdiction, and "can be raised at any time" including on appeal "by a party or by the court." *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 348 (5th Cir. 1989). Standing is a question of subject matter jurisdiction. *See Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055 (5th Cir. 1991). Those who do not possess standing may not litigate in federal court. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475-76, 102 S.Ct. 752, 760 (1982). 28 U.S.C. §2201 is remedial only. It does not extend the jurisdiction of federal courts. *Collin County, Texas v. Homeowners Ass'n for Values Essential to Neighborhoods (HAVEN)*, 915 F.2d 167, 170-71 (5th Cir. 1990). It does not confer an independent basis for jurisdiction. *Guaranty National Insurance Co. v. Gates*, 916 F.2d 508, 511 (9th Cir. 1990). *See also Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72, 70 S.Ct. 876, 879 (1950). Therefore, to the extent Pointer claims 28 U.S.C. §2201 as an independent basis for standing, such a reliance is ineffectual. Just as jurisdiction cannot be founded solely on §2201, neither can standing. Thus, Pointer cannot base standing upon tying Section 2201 to her 11 U.S.C. §505 claim, nor by relying solely upon Section 2201.

2.D. The Fifth Circuit properly utilized the law of standing.

Pointer finally claims, in general terms, that the Fifth Circuit misapplied the law on standing. The arguments under that subheading are, however, less than persuasive. She claims, among other things, that she "is not asking the court to undo something that has occurred, . . . she seeks a

declaration that an event never occurred, as found by the lower court." Petition at 42. As discussed earlier, however, acts in violation of the automatic stay, even if the liens were a violation, are voidable, not void. Further, the lower court did not hold that these liens were a non-act. The Bankruptcy Court's Judgment reads:

> . . . neither the City nor the ISD holds a lien against the Property to secure payment of 1987 and 1988 ad valorem taxes on the Property, *and to the extent any such liens attached to the Property* by operation of law, they are hereby declared void, invalid and of no effect.

Bankruptcy Court Judgment, at 3 (emphasis added). (R.164). Thus, the Bankruptcy Court did not, as Pointer argues, declare the liens to be non-acts and the Fifth Circuit did not improperly circumvent the finding of the lower courts.

Pointer closes by attempting to distinguish *In re Brooks*, 79 B.R. 479 (9th Cir. BAP 1987), *aff'd*, 871 F.2d 89 (9th Cir. 1989). *Brooks* was cited by the Fifth Circuit in a footnote merely to establish some of the very basic principles at work here. Even if it were successfully distinguished by Pointer, it would not change the court's overall analysis. Further, Pointer is not able to distinguish *Brooks* in any meaningful ways. She focuses on minor factual points, such as when deeds of trust were filed, and the fact that the *Brooks* were divorced. While these facts may be interesting, they are not relevant to our analysis. The Fifth Circuit cites to the statement of the *Brooks* court, that:

> if the debtor or the trustee choose not to invoke the protections of §362, no other party may attack any acts in violation of the automatic stay.

Brooks 79 B.R. 479, 481 (9th Cir. BAP 1987). Obviously the Fifth Circuit did not cite this as a hard-and-fast rule, for it

continues by showing the circumstances under which a creditor, like Pointer, may properly seek relief.

The analysis employed by the Fifth Circuit was correct in this case. Pointer cannot successfully challenge it, and therefore her Petition should be denied.

QUESTION NUMBER 3 (Restated)

> Does the automatic stay imposed by 11 U.S.C. §362 prevent post-petition "automatic perfection" of ad valorem tax liens against real property of the bankrupt estate?

The Fifth Circuit did not reach the issues raised in Question 3 of Pointer's Petition. The Fifth Circuit properly found that Pointer does not have standing to assert these issues at this time. Nevertheless, should this Court grant Pointer's Petition and further decide to hear issues not addressed by the Court of Appeals, it will find that the Taxing Units hold valid liens for the years 1987 and 1988.

3.A. The Fifth Circuit does not adopt the Fourth Circuit's rule on post-petition liens by implication or otherwise.

As discussed earlier, the Fifth Circuit properly examined Pointer's standing to avoid the liens in question via 11 U.S.C. §362 and §549. In so doing, that court did not adopt the standard established by the Fourth Circuit in *Maryland National Bank v. Mayor and City Council of Baltimore*, 723 F.2d 1138 (4th Cir. 1983) with regard to whether the automatic attachment of the liens violate the section 362 stay. Rather, that court specifically stated that:

> We are unable to address that issue here, however, because we hold that Pointer lacked standing under the Bankruptcy Code to avoid the post-petition tax liens as violative of the stay.

Matter of Pointer, 952 F.2d at 83. (Petition, A-2). What the court does not specifically detail, and what has caused Pointer such confusion, is why she needs standing if the liens did not attach.

In order to avoid these liens as violative of section 362, something has to be done to invoke section 362. *See, e.g., In re Brooks*, 79 B.R. 479, 481 (9th Cir. BAP 1987), *aff'd*, 871 F.2d 89 (9th Cir. 1989) (If the debtor or the trustee chooses not to invoke the protections of 362, *no other party may attack any acts in violation of the automatic stay);* and *In re Electric City, Inc.*, 43 B.R. 336, 342-43 (Bankr W.D.Wash. 1984) (The assertion of a lien as a post-bankruptcy transfer could be *subject to invalidation* under §549). After all, acts taken in violation of the section 362 stay are voidable, not void. *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989), and that which is voidable operates to accomplish the thing sought until the fatal vice has been judicially declared. *Slaughter v. Qualls*, 139 Tex. 340, 162 S.W.2d 671, 674 (1942). A transfer of property made in violation of the stay constitutes an unauthorized post-petition transfer which may be avoided under section 549 *Matter of Missionary Baptist Foundation of America, Inc.*, 796 F.2d 752, 764 (5th Cir. 1986). These are the rules the Fifth Circuit utilized in its disposition of this cause. It clearly did not delve into the philosophical depths alleged by Pointer.

3.B. The automatic attachment of ad valorem tax liens versus the section 362 stay.

Nevertheless, should this Court decide to reach the issues not addressed by the Fifth Circuit, it will find that the liens in questions validly attached to the Property.

(i) The liens at issue validly attached notwithstanding section 362.

State law determines when a lien for property tax arises. *Equibank, N.A. v. Wheeling-Pittsburgh Steel Corporation*, 884 F.2d 80, 84 (3d Cir. 1989). Under Texas law:

> On January 1 of each year, a tax lien attaches to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on that property.

TEX. TAX CODE ANN. §32.01 (Vernon Supp. 1992). The tax lien attaches automatically, without any act from any taxing unit, and is impressed:

> . . . whether or not the taxes are imposed in the year the lien attaches.

Id. The tax lien exists, therefore, regardless of any assessment or any action whatsoever.

Pointer's argument is that, because the attachment of a tax lien is an attempt to create or perfect a lien against property of the estate, the liens should be deemed invalid. Section 362 (a) of the Bankruptcy Code Provides:

> [A bankruptcy] petition filed . . . operates as a stay, applicable to all entities of . . .
>
> (4) any *act* to create, perfect, or enforce any lien against property of the estate.

11 U.S.C. §362 (a) (emphasis added). Pointer's argument must fail in this case because no act to create or perfect the lien is performed by any taxing unit, nor is any act required of them. Thus, the automatic imposition of the lien does not violate the stay provision. The only thing that would keep the lien from attaching is for January 1 not to occur. When January 1 arrives, the lien automatically attaches without any act being performed.

In dicta, the Second Circuit rejected the "no act" argument in *In re Parr Meadows Racing Association, Inc.*, 880 F.2d 1540, 1545 (2d Cir. 1989). However, *Parr Meadows* and the cases cited thereby deal with statutory schemes that are fundamentally different from the ad valorem taxation process in Texas. When Pointer asks this Court to "establish a single rule to be applied equally in all circuits" (Petition at 48), she exposes her misunderstanding of the rule that whether a lien arises is a matter of state law and that the statutory schemes involved will differ from state to state and, *a fortiori*, from circuit to circuit. The *Parr Meadows* court takes time to point out that its decision depends heavily on the state law involved. *Parr Meadows*, 880 F.2d at 1548.

The "no act" argument was taken up in dicta by the *Parr Meadows* court due to the fact that the New York statute involved therein expressly requires "affirmative acts" on the part of government before a tax lien can arise. *Id.* at 1544-45. The same is true of the statutes involved in the cases cited by the *Parr Meadows* court and relied upon by Pointer. For example, in *In re Beliman Farms, Inc.*, 86 B.R. 1016 (Bankr. D.S.D. 1988), the South Dakota scheme at issue provided that a lien arises each January 1 to secure payment of taxes *assessed*, and *found* to be *due* and *owing* for the *previous* year. *Bellman Farms*, 86 B.R. at 1019. As with the New York scheme at issue in *Parr Meadows*, this procedure is completely the reverse of that provided by Texas law. Likewise, citations to *Equibank, N.A. v. Wheeling-Pittsburg Steel Corp.*, 884 F.2d 80 (3d Cir. 1989) and *In re Carlisle Court*, 36 B.R. 209 (Bankr. D.D.C. 1983) are misplaced for purposes of dispelling the "no act" argument as applied under Texas law. Although the *Equibank* court, citing *Carlisle Court*, holds that tax liens that do not arise until after the effective date of the stay are invalid, it was

apparently not confronted with the argument that the liens arose without the necessity of any affirmative act and it does not explain the reasoning upon which it relies. The *Equibank* court cites only to *Carlisle Court*, which says that in the "broad application" of the stay provision, the "creation" of a lien is barred. *Carlisle Court*, 36 B.R. at 214. However, we are never informed as to what is meant by "broad application" or "creation", and the court cites only to the statute, which of course bars only an *act* to create, perfect, or enforce a lien. 11 U.S.C. §362 (a) (4) Pointer also cites to *In re Guterl Special Steel Corporation*, 111 B.R. 107 (W.D.Pa. 1990) *aff'd sub nom. Makaroff v. City of Lockport*, 916 F.2d 890 (3d Cir. 1990). The *Guterl* court, however, is merely discussing *Parr Meadows*, which of course construes New York Law.

The District Court rested its decision that the lien imposition is an act violative of the stay at least in part upon the conclusion that the definition of "act to create" includes those acts, which under Texas law take place well after the lien is perfected, and possibly after the bankruptcy case is dismissed, necessary to assess the amount of taxes owed for a given year. *See* Memorandum Opinion of District Court at p.7 n.7. (Pointer Petition at C-28). Pointer also places great reliance on this rationale. *See* Petition at 50. This point provides no comfort to Pointer, however.

The lien which arises under Texas law each January 1 is not an imperfect one. It is perfected when it arises and cannot be avoided merely because it arises before the amount of taxes due for a given year has been computed or formally assessed. *See Stanford v. Butler*, 826 F.2d 353, 357 (5th Cir. 1987). Pointer argues that the subsequent acts do constitute an "act" as proscribed by section 362, and cites to *Parr Meadows* and its construction of New York law. *See* Petition at 50-51. This case, however, concerns the state law of

Texas. Citations to New York law and cases construing same simply do not aid the calculus. Thus, since property tax liens in Texas arise automatically each January 1 with no antecedent nor subsequent acts necessary in order for them to be established, the stay provision of section 362 is simply not violated thereby.

(ii) These liens would be valid even if they did constitute an "act" ordinarily proscribed by section 362 (a).

Even if the imposition of the liens did constitute an act violative of the section 362 stay, they would be valid nevertheless. This is because they attach post-petition to secure a pre-petition interest, thereby meeting the requirements of section 362(b)(3) and 546(b) of the Bankruptcy Code, which carve out an exception to the stay provision. The Taxing Units have an interest in the property that can be described not only as pre-existing the petition, but also as ever-present. It should be noted, however, that the circuits are split on this issue.

The Fourth Circuit, in *Maryland National Bank v. Mayor and City Council of Baltimore*, 723 F.2d 1138 (4th Cir. 1983), held that the taxing unit's imposition of its post-petition tax lien was valid and that the creditor-mortgagee who had the stay lifted would be liable for the taxes which the lien secured. *Also See Stanford v. Butler*, 826 F.2d 353, 357 (5th Cir. 1987). One reason given by the *Maryland National* court to support its holding is that the interest held by the taxing unit under Maryland law is "ever present," and therefore the liens can be perfected post-petition. *Id.*, 723 F.2d at 1142-43. The *Maryland National* rationale has been cited in the Seventh Circuit and the First Circuit. *See In re Klefstad* 95 B.R. 622 (Bankr. W.D.Wis. 1988); *In re Martin*, 106 B.R. 334 (Bankr. D.Me. 1989).

Yet the *Parr Meadows* court, 880 F.2d 1545 (2d Cir. 1989), held that the taxing unit, acting under New York law, "did not possess, prior to the filing of the bankruptcy petition, a sufficient 'interest in property' to qualify for the §546(b) exception." *Id.* at 1548. The Third Circuit reached the same holding as *Parr Meadows*, but by citing to *Parr Meadows* and not by its own, independent analysis. *See Equibank, N.A. v. Wheeling-Pittsburgh Steel Corporation*, 884 F.2d 80 (3d Cir. 1989).

CFBISD, as a political subdivision of the State of Texas, has a pre-existing interest in all land upon which a tax lien arises. The basis of the tax lien is derived from article VIII, section 15 of the Texas Constitution, which refers to the lien imposed on the annual assessment as "special." It reads:

> The annual assessment made upon landed property shall be a special lien thereon . . .

TEX. CONST. art. VIII, §15. CFBISD realizes that the word "annual" appears in this provision, but that word clearly refers to the assessment and the lien, which CFBISD agrees only occur on an annual basis. What must be borne in mind, however, is that the state, and CFBISD as a political subdivision thereof, have an ever-present interest in the property which allows, *inter alia*, the assessment of the property each and every year. This interest is evident in the fact that a lien attaches to all real property in the state each and every January 1, even without any affirmative act by any governmental unit. TEX. TAX CODE ANN. §32.01 (Vernon Supp. 1992). It also can be seen in article XVI, section 50 of the Texas Constitution, which excepts from the homestead exemption taxes due upon the property, as well as the powers of eminent domain and condemnation, and so forth. Certainly, in Texas at least, the state's "interest" in the property does not arise merely coincidentally with the

imposition of the lien. This reasoning would fail to take into account the interest which gives rise to the power to provide for a lien in the first instance.

Moreover, in this particular case, an even more specific interest predates the petition. A pre-existing interest in the Property accrued when it was still within the VVAL bankruptcy, via 28 U.S.C. §960, which provides for the tax liability of the trustee for taxes due in the VVAL bankruptcy. Section 960 provides:

> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

28 U.S.C. §960. Consequently, CFBISD was able to assess and levy on the Property while it was in the VVAL bankruptcy. When it left that bankruptcy, it carried with it that assessment, which preexisted Pointer's stay vis-a-vis the Property. Therefore, the liens may validly attach pursuant to section 546(b) in order to perfect that pre-existing interest. Thus, the liens are not void even if they would otherwise violate the section 362 stay.

CONCLUSION

The Fifth Circuit correctly addressed the issue of Pointer's standing herein. It was well within its powers to determine standing even though the issue was not addressed by the Bankruptcy Court or the District Court. Pointer, in her Petition, is unable to show any valid basis upon which this Court can reverse the decision of the Fifth Circuit, for she has not shown any viable claim of standing to litigate the issues involved herein at this time. Further, the Fifth Circuit did not undertake any grand philosophical

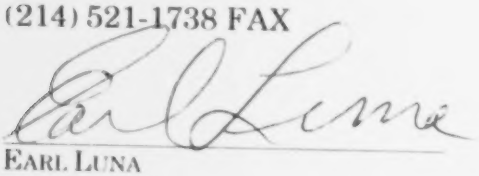
scheme to rule on a potential stay violation by ruling on standing. Rather, the court has cleared up the procedure within which creditors similarly situated to Pointer may seek redress.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent Carrollton-Farmers Branch Independent School District respectfully requests that this Honorable Court deny Pointer's Petition for Writ of Certiorari and for such other and further relief to which it may be justly entitled.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.
EARL LUNA
Counsel of Record
State Bar No. 12690000
Michael L. Atchley
State Bar No. 01397600
4411 N. Central Expressway
Dallas, Texas 75205
(214) 521-6001
(214) 521-1738 FAX



EARL LUNA

Attorneys for Respondent
Carrollton-Farmers Branch
Independent School District

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent Carrollton-Farmers Branch Independent School District's Brief in Opposition was served on the parties listed below via hand delivery or certified mail, return receipt requested, postage prepaid, on this 9th day of June, 1992:

Richard Scott Steinbach
STEINBACH & STEINBACH
5550 LBJ Freeway
Suite 620
Dallas, Texas 75240

James E. Porter
Perdue, Brandon & Fielder
P.O. Box 13430
Arlington, Texas 76094-0430

Earl Luna

Earl Luna